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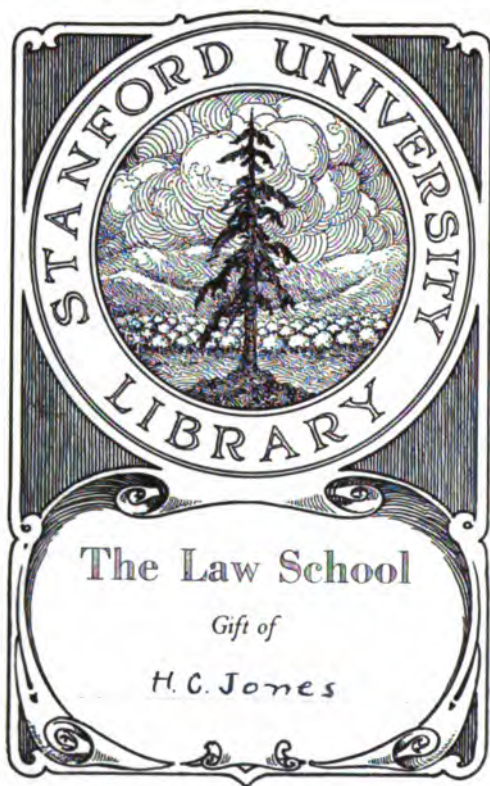
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THE
AMERICAN PROBATE REPORTS:

CONTAINING

RECENT CASES OF GENERAL VALUE DECIDED IN
THE COURTS OF THE SEVERAL STATES ON
POINTS OF PROBATE LAW.

WITH NOTES AND REFERENCES.

BY WM. W. LADD, JR.

VOL II.

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**THE
AMERICAN PROBATE REPORTS.**

THE
AMERICAN PROBATE REPORTS.

SAMPSON *vs.* RANDALL.

[72 Maine, 109.]

GIFT OF INCOME OF REAL OR PERSONAL ESTATE; WHETHER IN
FEE OR FOR LIFE.—SECURITY FROM DONEE FOR LIFE.

The gift of the perpetual income of real estate is a gift of the fee; a gift of the income for life is a gift of a life estate.

The same rule applies to personal estate, and the donee for life has the actual possession of the property, unless the will otherwise provides.

The court may require security from the donee for life that the property shall be forthcoming, intact, at the expiration of the life estate, in a case of real danger.

BILL IN EQUITY to obtain the construction of the following will :

“Be it hereby known that I, Albion Q. Randall, of Bowdoinham, county of Sagadahoc and State of Maine, being of sound mind, do hereby make my last will and testament.

“Unto my mother, Lucy Randall, of Bowdoinham, I will and bequeathe the income of one-third of my property during her natural life.

“Unto my sister, Sarah F. Mariner, I will and bequeathe the income of one-sixth of my property during her natural life and children forever. But should she have no children, then the money will go as described.

“Unto my sister, Margaret White, of Richmond, I will and bequeathe the income of one-sixth of my property during her natural life.

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"Unto the children of Samuel W. Randall, I will and bequeathe the income of one-tenth, in equal shares, to each during their natural lives. To the towns of Bowdoinham and Richmond I will and bequeathe the perpetual income of one-tenth to each, to be used by the selectmen in providing for poor aged people, as they in their kindness may from year to year devise.

"To the son of Rewel, one hundred dollars I will and bequeathe in consideration of their naming him for me.

"Unto Louisa Small, daughter of Elizabeth Temple, I will and bequeathe the income of the remainder, during her natural life—the remainder being nearly one-thirtieth—at her decease the same to her child or children, and so on. At the decease of my mother, I will and bequeathe the income of one-sixth, being one-half whose income was bequeathed my mother, unto Harriet C. Ring, of Lubec, Maine, during her natural life. I will and bequeathe the income of the other sixth to Samuel W. Randall during his natural life, and at his death the income is to be divided in equal shares—to his children and theirs—perpetual. At the decease of Harriet C. Ring, if her mother be living, she shall receive the same during her natural life. At the decease of both, the children of Rewell and Merrilla Webber, of Richmond, shall have the same income during their natural lives and their children in perpeal.

"Should in any of the contingent remainders herein named—there be any doubt as to the disposition of said remainder, it is my will that the general course of the law be followed.

"I hereby appoint Henry Q. Sampson and Samuel W. Randall, both of Bowdoinham, Maine, to be my lawful administrators.

[SEAL.]

"A. Q. RANDALL."

"Witnesses: Edward P. Bond.

Albert H. Shedd.

Leigh R. Worcester.

"Executed in Boston, December 21, 1877."

J. W. Spaulding and F. J. Buker, for the executors and others.

W. T. Hall, for Hatherly Randall and others.

E. J. Millay, for Lucy Randall and others.

Powers and Powers, for Mrs. J. Ring and Harriet C. Ring.

WALTON, J. This is a suit in equity praying for the construction of the will of Albion Q. Randall. The facts stated in the bill are to be taken as true. The first question is whether all the provisions of the will can be sustained. They cannot. The testator has in some of the provisions attempted to create perpetuities. These provisions must of course be rejected. All the other provisions may be sustained. The life estates which are certain to vest within a life or lives in being, and twenty-one years and the period of gestation thereafter, are valid. What will become of the testator's property when all these life estates shall end, is a question which in no way affects the executors and will not now be considered. The facts stated in the bill are not sufficiently full to enable us to do so. The application of a few well-settled rules of law will determine the rights of the parties now before the court, and relieve the executors of all doubt as to the course to be pursued by them.

Of the real estate. It is a settled rule of law that a gift of the income of real estate is a gift of the real estate itself. A gift of the income for life is the gift of a life estate. A gift of the perpetual income is a gift of the fee. The effect of this rule upon the will in question is obvious. Those to whom the testator has given the income for life will take a life estate, and those to whom he has given the perpetual income will take a fee-simple estate. The towns of Bowdoinham and Richmond will take fee-simple estates in trust for the purpose named in the will as tenants in common with the other owners. This is all which it is necessary to say of the testator's real estate. In support of the rule here stated, see *Andrews v. Boyd*, 5 Maine, 199; *Butterfield v. Haskins*, 33 Maine, 392; *Earl v. Rowe*, 35 Maine, 414.

Of the personal estate. It is the duty of the executors to reduce the personal assets to money, and, after the payment of the debts, if any, and the costs of administration, to distribute the residue among the immediate donees in the proportions named in the will. True, the testator has given the income only to the immediate donees, except a small legacy of a hundred dollars to a boy in consideration of his having been named for him. But the same rule applies to personal estate as to real estate, namely, the gift of the income is in contemplation of law equivalent to a gift of the property itself. If the gift is of the income for life the donee takes a life estate; and if the gift is of the perpetual income, then the donee becomes the absolute owner of the property. So held in *Stone v. North*, 41 Maine, 265.

And the rule adopted in this State is to allow the donee for life to have the actual possession of the property, unless the will otherwise provides. *Starr v. McEwan*, 69 Maine, 334; *Warren v. Webb*, 68 Maine, 133.

It is said to have been at one time held that there could be no gift over of personal property; that a gift for life made the donee the absolute owner of the property. But it is now settled both in England and in this country that personal property may be limited over by way of remainder, after the expiration of a life interest. And it was formerly held that the remainder-man might exact security from the donee for life that the property should be forthcoming intact at the expiration of the life estate. But that practice, says Chancellor Kent, has been overruled, and the modern practice is to require nothing more than an inventory of the property, although the court may still require security in a case of real danger and where the relations of the parties are such as to render such a course expedient. 2 Kent's Com., 454. We think no security should be required in this case, except a receipt, to be filed in the probate office when the executors settle their final account. If the donees for life can have the use and possession of their several shares of the testator's estate, it will be a substantial benefit to them; otherwise probably of very little benefit. If testators do not desire to have

the remainders provided for in their wills thus endangered, they can easily guard against the danger by the appointment of trustees, and declaring that the income only shall be paid to the donees for life. Most wills creating remainders contain such provisions. The will now under consideration contains no such provision.

The court is asked to ascertain and decree who the testator meant by the "son of Rewel," to whom he bequeathed a hundred dollars. There is no evidence before the court on which to found such a decree. The executors say they are informed and believe that Quincy Randall Webber is the person intended; but mere information and belief is not evidence on which the court can act. But if no one else appears to claim the legacy, no reason is perceived why the executors may not safely pay it to the person named; or, if he is a minor, to his guardian.

This is an amicable suit. All the parties appear to be equally desirous of obtaining the judgment of the court. No costs are, therefore, allowed to either of them. The executors may charge such expenses as have been necessarily incurred by them in the prosecution of the suit in their administration account, and the judge of probate will allow for such items and such amounts as he deems just and reasonable.

Bill sustained, and a decree may be entered in accordance with the principles herein stated.

APPLETON, C. J., DANFORTH, VIRGIN, PETERS and SYMONDS, JJ., concurred.

Upon the construction of devises conveying estates in fee or for life, see Foote v. Saunders, *infra*, and note; Stuart v. Walker, *infra*; Copeland v. Banon, *infra*; Johnson v. Id., *infra*, and note.

As to right of life tenant to possession of gift of personalty with remainder over, Brannock v. Stocker, *infra*, and note; Britt v. Smith, *infra*.

TERHUNE *vs.* WHITE.

[34 New Jersey Eq., 98.]

CLAIM ON ASSUMPTION OF MORTGAGE NOT PROVABLE.

A claim against decedent's estate arising on his assuming a mortgage, is not provable until after foreclosure.

BILL to establish and enforce liability for a deficiency arising on the sale of mortgaged premises.

E. E. Green and *J. Wilson*, for defendant.

J. F. Hageman, Jr., for complainant.

THE CHANCELLOR. A rehearing of this cause is sought by the defendant, the executrix of George White, deceased. The suit is brought to establish and enforce her liability to pay deficiency. The advisory master to whom the cause was referred advises that a decree be made against her. The facts are, that the premises were conveyed to White in 1872, subject to several mortgages, among which was that of the complainant, and he assumed the payment of the latter incumbrance as part of the consideration of the conveyance. White died February 15, 1872. His will was proved on the 27th of that month. On the same day an order of the Orphans Court was duly made, requiring the creditors of the estate to bring in their claims within nine months. Publication of it was made, as required by law. The time limited expired November 27, 1877. The complainant never put in his claim. In 1878 he began a suit in this court to foreclose his mortgage, and the premises were sold under the final decree therein in November of that year. There was a deficiency. This suit was brought in 1879. The liability which it is brought to establish and enforce is purely equitable, resting wholly on the doctrine of equitable subrogation; and while it may be said to have existed in contemplation of equity, under the circumstances which the case presents, from the time when the as-

sumption was made, yet it was from the time when the deed to White was given, subject to extinguishment by the *bona fide* action of the parties to that deed, and their legal representatives, up to the time when the proceedings in foreclosure were begun. *Crowell v. Hosp. of St. Barnabas*, 12 C. E. Gr. 650. And, moreover, it was not enforceable, and was, therefore, merely contingent at most, until the fact of the existence of a deficiency had been established. It could not have been, before that time, proved as a claim against the estate of White, for it was a mere contingent equity, and in no sense a legal liability. Apart from that consideration, under the facts the order to limit creditors of itself constitutes no bar to the decree sought in this suit. It is not alleged that the estate of White proved insolvent, and the order was not followed by a final decree of the Orphans Court barring creditors. By the sixty-second section of the Orphans Court Act (Rev. 764), it is provided that after the expiration of the time limited in the order, the Orphans Court, upon proof to its satisfaction that the notice has been set up and advertised as directed, may, by final decree, order that all creditors who have not brought in their claims within the time in the order directed, shall be barred from any action therefor against the executor or administrator; and that any creditor who shall have neglected to bring in his debt, demand or claim, within the time so limited, shall, by such decree, be forever barred of his action therefor against such executor or administrator, except as thereafter provided; and the proviso referred to is, that in case such creditor so failing to present his debt, demand or claim, shall, after the final settlement of the account of the executor or administrator, find some other estate not accounted for, he shall be entitled to have his debt, demand or claim paid thereout, or a ratable proportion thereof, in case other creditors shall be barred of their debts, demands or claims. Before the passage of the Revision the order and notice constituted such bar. *Nix*. Dig. 653, § 70; *Ryan v. Flanagan's Admr.* 9 Vr. 161. And it was provided that the Orphans Court might, on proof to its satisfaction of the publication of the order to limit, by its final decree, order that all creditors who

had not come in within the time limited should be barred; and it was also provided that the decree should be conclusive. Nix. Dig. 308, § 29. By the Revision, the law has been changed, and the revised act declares in terms that the decree shall constitute the bar. It is not profitable to consider whether it was within the province of the revisers to make such alteration in the law, for the act as it stands is not their act, but the act of the law-making power. It is urged, on the part of the complainant, that the Supreme Court, in *Ryder v. Wilson's Exr.* 12 Vr. 9, construed the provision under consideration, and held that, except there be a decree, there will be no bar. This court, in the construction of a statute, follows that which the courts of law have put upon it. Such is necessarily the rule. It is obvious that a different rule would produce infinite confusion. The Supreme Court, however, in the case referred to, does not construe the act, and what is said on the subject is a mere statement of the position of the demurrant, yet it is manifest from the opinion that it assumes that, by the Revision, a change was introduced, and that now there is no bar unless there be a final decree.

The decree will be signed, as advised by the master.

See *Curley v. Hand's Estate*, *infra*, and cases cited in note.

JENNINGS vs. TEAGUE.

. [14 South Carolina, 229.]

EXECUTION OF POWER OF SALE BY SOLE QUALIFIED EXECUTOR.— EXERCISE OF DISCRETION AS TO TIME OF SALE.

A power of sale to several executors may be executed by the sole qualified executor.

A direction to executors to sell all testator's estate "so soon as the value of property shall recover from the depression caused by the existing war," makes them the sole judges of the time for action, and a sale made in the exercise of their honest judgment is valid even if shown to be an error of discretion.

BILL to set aside a sale of land, and for an accounting of rents and profits. Judgment was entered on the report of a referee, dismissing the bill with costs. Plaintiff appealed.

The facts are sufficiently stated in the opinion.

J. P. Carroll and *M. W. Gary*, for appellants.

L. F. Youmans, Attorney-General, for respondents.

MOLVER, A. J. The principal object of this action was to have the sale of a certain tract of land set aside, the deed given therefor cancelled, and an account from the purchaser for the rents and profits since the sale. Indeed, the only question made by the appeal is as to the validity of the sale.

The land in question originally belonged to P. L. Calhoun, who died some time in the year 1863, having first duly made and executed his last will and testament, which bears date August 1, 1861. The clause of the will which, it is claimed, contains the power of sale under which the executor acted, is as follows: "I desire that my executors, hereinafter to be named, shall sell all my estate, both real and personal, of what nature or quality soever it may be, so soon as the value of property shall recover from the depression caused by the existing war;" and after providing for the payment of his debts and the distribution of the remainder, the testator appointed Dr. A. G. Teague and his son, J. C. Calhoun, executors, the former of whom alone qualified. On the same day that Dr. Teague qualified as executor, he obtained from the ordinary an order for the sale of the personalty, and on October 27, 1863, after due advertisement, the whole estate, both real and personal, was sold for cash, in Confederate money, in accordance with the suggestions and advice of the appraisers, and a due return of the sale-bill made to the ordinary on November 10, 1863. This sale was attended by many of the parties now seeking to set it aside, some of whom became purchasers to a large amount. No objections appear to have been made to the sale by any of the persons interested under the will, though there is evidence that the plaintiff, W. D. Jennings, who was

a creditor of the estate, did object to having the property sold for Confederate money, though his objections do not seem to have been communicated to the defendant Martin, who was the largest purchaser at the sale, he having bid off the land now in controversy for the sum of \$32,000, paid his bid in cash, in Confederate money, and received a deed from the executor. Jennings, also, notwithstanding his objections, became a purchaser at the sale to an amount not inconsiderable, a part of which, however, was, as he says, for the benefit of the widow and part for a young lady to whom he owed some money, while the remainder was for his wife. In about two months after the sale, the widow of the testator, before the plaintiff, W. D. Jennings, as a notary public, formally released all her interest and estate, and all her claim of dower in the land sold to Martin, the purchaser at the executor's sale; and some of the parties interested received from the executor, out of the proceeds of sale, large amounts of money.

It is very clear that at the time all parties interested considered the sale a good and valid sale, and that there is not a shadow of ground for saying that there was any fraud, or concealment, or misrepresentation which would tend to invalidate it. On the contrary, all the circumstances go to show that the sale was, at the time, satisfactory to all parties concerned, unless it be W. D. Jennings, who, as a creditor, may be regarded as interested in the estate. But even he, taking all his conduct together, can scarcely be regarded as making any opposition to the sale, but merely expressing a dissatisfaction with the terms of sale by which purchasers were allowed to pay their bids in Confederate money.

But, conceding all this, the validity of the sale is challenged upon the ground of a want of power in the executor to make the sale. *First.* Because there were two executors appointed, and one could not sell even though the other never qualified. *Second.* Because the power to sell was conditional, and as the condition never happened the power never vested. As to the first ground, it is very clear that it cannot be sustained. The very object of the statute (21 Henry VIII, ch. 1V, 2 Stat. 457), which was in force at the time this sale was made,

was to obviate this objection. *Britton v. Lewis*, 8 Rich. Eq. 271.

As to the second ground, it is quite clear that the power of sale was a conditional one, and it is equally clear that the condition was, in its nature, precedent and not subsequent, and that, such being the case, until the condition was performed, or the contingency upon which the power was conferred happened, the power could not be lawfully exercised. So that the real question in this case is, whether the contingency upon which the power to sell was given had happened at the time the sale was made, and as subsidiary to this, who was to determine whether the contingency had happened. To solve these questions it will be necessary to inquire what was the nature of the condition. Was it the happening of a distinct and independent fact, or was it a condition which, in its very nature, involved the exercise of judgment or discretion for the determination of whether it had happened, and about which, therefore, there might well be, as there was in this very case, honest difference of opinion? It certainly was not a distinct and independent fact, as if the testator had provided that the executor should sell when a certain person should attain to a certain age, but it was a condition the happening of which could only be determined by an exercise of judgment. When the value of property should recover from a depression caused by a war, or by any other special circumstance, must necessarily be a question to be determined by the exercise of judgment—one about which persons might, and probably would, honestly differ. What was to be the extent of the recovery which would authorize a sale? Somebody must judge of this, and if the executor is not permitted to do so, then it is difficult to suggest who could. If the executor commits an error of judgment in determining such a question, that, certainly, ought not to invalidate a sale made by him in the honest exercise of his judgment. If it did, then it would be impossible to tell, until after it was tested by a judicial proceeding, whether any sale made under such a power was valid, and if such a rule be established it would destroy all chances of making such a sale, for, certainly, no one would buy with the

prospect of having his title inquired into and assailed years after upon the ground that the executor had committed an error of judgment in determining a question which was left to his discretion.

It is perfectly manifest that the testator in this case intended to invest his executor with power to sell in a certain contingency, the happening of which must necessarily be determined by an exercise of judgment, and unless his executor—the person whom he has selected as possessing more of his confidence than any one else—is authorized to determine this question, then the purpose of conferring upon the executor the power to sell would be practically defeated. That purpose, doubtless, was to avoid the necessity of obtaining an order of the court for the sale, which would involve delay and expense; but if the executor is denied the power of determining the time for the sale, or if his honest determination is liable to be revised and reversed by the court, then, clearly, it would have been better to have required a resort to the court in the first instance, rather than to give an apparent power to the executor, which would only serve to delude purchasers and result in greater delay and larger expense than if the will had required a resort to the court in the first instance. That these views are not without the support of authority, may be seen by reference to the case of *Greer v. McBeth*, 12 Rich. Eq. 254. The cases of *McCants v. Bee*, 1 McC. Ch. 383, and *South Carolina R. R. Co. v. Toomer*, 9 Rich. Eq. 270, relied upon by the appellants, do not, in our judgment, conflict with these views. In the former case the question was not really made, but it was suggested that the executor was willing to confirm a contract for the sale of a slave which had been made by the life tenant, about which the real controversy was, and the court, among several other reasons why the executor could not make the sale, said that the power given to the executor was only to sell such property as was useless to the estate, and that the court could not suppose that this conferred a power to sell the slave in question, without assuming, which it would not do, that the executor was willing to commit a fraud, for there was another provision in the will directing the executor to increase

the stock of that kind of property by investing the surplus funds of the estate in the purchase of slaves; for if the court were at liberty to suppose that the slave was of such a description as to be useless to the estate, then it would have to suppose that the executor was willing to commit an actual fraud by imposing upon a female property which he knew to be worthless. In the case of *Railroad Company v. Toomer*, the condition upon which the power to sell was given was the happening of a distinct fact, and was not a condition which would have to be determined by the exercise of judgment or discretion.

When, therefore, as in this case, a power of sale is given to an executor, upon the happening of a contingency which can only be ascertained by the exercise of judgment and discretion, and the executor, in the honest exercise of his judgment, determines that such contingency has happened, and accordingly makes the sale, such sale cannot be invalidated, even though it should be made to appear, in the light of subsequent events, that the executor had committed an error of judgment in determining whether the contingency had happened upon which he was authorized to sell. If, however, it should appear that the executor erred willfully, or from such gross negligence as would imply willfulness, then it would be different, and the question whether the sale should be allowed to stand, would depend largely upon whether the purchaser had notice of such misconduct upon the part of the executor. In this case, as we have seen, there is no foundation for a suspicion even that the executor acted otherwise than honestly in determining whether the contingency had happened upon which he was authorized to sell, and, therefore, upon the principles above stated, there is no ground for invalidating the sale.

The judgment of the Circuit Court is affirmed.

McGOWAN, A. J., concurred.

. SPAULDING *vs.* WAKEFIELD'S ESTATE.

[53 Vermont, 660.]

DEGREE OF CARE REQUIRED OF EXECUTOR IN MANAGING ESTATE.

An executor or administrator is bound to bring to the management and closing of an estate the same care and diligence which a prudent man would exercise under like circumstances. The liability of the executor for the loss of the estate is not wholly dependent on the question of whether he has acted in good faith.

It is negligence on the part of an executor to deliver a \$1,000 U. S. 5-20 bond, worth at the time in all the markets of the country \$1,200, to each of three legatees in payment of a \$1,000 legacy to each; and he is liable for the loss.

The executor is also liable for the premium and interest on an \$800 bond deposited in the bank to create a fund upon which to draw to pay the expenses of settling the estate; as it was not found by the commissioner that the creation of such a fund was necessary.

The executor was entitled to no leniency at the hands of the court, by virtually remaining silent as to how much the bond brought, how much interest he received on it, whether he mingled the avails with his own funds, &c., and should, therefore, be charged with the highest market value of the fund, and the highest rate of interest.

THE court below rendered judgment, *pro forma*, on the report in favor of the estate for \$1,522 79. The commissioner found, among other facts :

Mrs. Wakefield had, at the time of her decease, U. S. 5-20 government bonds of the issue of 1867, representing at their face value three thousand eight hundred dollars, on deposit at the First National Bank of Brattleboro'. The appraisers appointed by the Probate Court, upon Mrs. Wakefield's estate, appraised said bonds at their face value. The executor was told by the judge of the Probate Court that it would be proper for him to pass over three thousand dollars' worth of said government bonds, at the appraisal, to pay the three legacies of one thousand dollars each, specified in said will, but no order or decree was made by the Probate Court to that effect. On the 2d day of May, 1874, the executor paid over to the legatees, Mariah N. Graves, Sarah M. Kenney, and Aurora E. Spaulding, each, one of said bonds of the denomination of one thousand dollars, to cancel their legacies under said will, as he

supposed he had a legal right to do. The bonds at that time were worth, in New York, from 1.20 3-5 to 1.20 1-4. They were worth in Vermont, at the same time, a premium of twenty per cent., which would be their market value in New York or Boston, less a per cent. off for converting them. * * * If the plaintiff should be charged with the premium of twenty per cent. on the three thousand dollars in bonds, which he paid to the legatees, with simple interest thereon, from May 2, 1874, to September 14, 1880, then the above sum of four hundred and seventy-two dollars and forty-two cents should be increased eight hundred and twenty-nine dollars and twenty cents, making the sum for which plaintiff is chargeable one thousand three hundred and one dollars and sixty-seven cents. If the plaintiff should be further charged with the premium of twenty per cent. on the eight hundred dollars in bonds, which he deposited in the First National Bank of Bellows Falls, with simple interest thereon from May 2, 1874, to September 14, 1880, then the sum above stated should be increased two hundred and twenty-one dollars and twelve cents, making the sum for which plaintiff is chargeable, amount to one thousand five hundred and twenty-two dollars and seventy-nine cents.

R. W. Clark and Haskins & Goodwin, for the plaintiff.

A. Stoddard and Davenport & Eddy, for defendant.

Ross, J. It is well settled that the measure of care and diligence which an executor or administrator is bound to bring to the management and closing of the estate, is that which a prudent man would exercise under like circumstances. However much of good faith and honest intention he may exercise in the discharge of his trust duties, unless he also exercises this degree of care and diligence, and the estate suffers from the lack of it, he is bound to make the loss good to the estate. Measured by this standard, we think, the delivery of a \$1,000 U. S. 5-20 bond, worth at the time in all the markets of the country \$1,200, to each of the three legatees in payment of a legacy to each of \$1,000 was negligence, and rendered the plaintiff liable to account for the loss to the estate. We can-

not yield to the claim of the plaintiff's counsel, that his duty was discharged when he obtained the value placed upon the bonds by the appraisers, or the amount which the government promised to pay the holder. The very fact which he urges, to wit, that such obligations were fluctuating in the market, bound him to keep informed in regard to their market value, and to use the diligence of a prudent man to take advantage of the market, and realize the most possible for the estate. Nor does what the Probate Court told the plaintiff at all lessen the measure of care and diligence he was bound to exercise in the discharge of his duties. He was bound to know the law, and if he had doubts about his knowledge, or ability, to obtain accurate knowledge of the degree of care and diligence which he was bound to exercise, he should have declined the trust. What the Probate Court told him would have an important bearing upon his good faith in the transaction, if that were the only element entering into the determination of his liability. As these bonds were interest-bearing securities, the plaintiff was properly charged with interest on the amount of the overpayment of the legacies. Besides, it would have been his duty to have exercised this same degree of care and diligence to have kept the overplus at interest. His act, which occasioned the loss, put it out of his power to exercise this degree of care and diligence in placing the overplus at interest. The same considerations apply in regard to charging him with the premium on the \$800 bond. It is contended that the interest on the premium on this bond stands on a different basis from the interest on the premiums on the other bonds. He claims that he deposited that bond in the bank where he kept his individual deposits to create a fund upon which to draw to pay the expenses of settling the estate. The commissioner has not found that the creation of such a fund was necessary or proper in the settlement of this estate. He would be bound to the same measure of care and diligence in regard to this as to all other matters in the settlement of the estate. When asking to have the decision of the commissioner and County Court reversed in regard to this item, it is for him to establish that the creation of such a fund was required. On other grounds the decision of the

commissioner and of the County Court in this particular can be upheld. He was called upon by the Probate Court to account for this bond, and was there charged with the premium and interest thereon. The case was brought to the County Court, and he was again called upon to account for the same. Knowing just what he had done with the bond, and having the means, by applying to the bank, to ascertain and inform the commissioner just what he received for the bond, and what interest, if any had been allowed him for the money derived from the sale, he has wholly failed to inform the commissioner in these respects, as well as whether the bond was in fact sold by the bank, and whether, if sold, the avails were mingled with his individual funds on deposit in the bank. His so-called accounting is substantial silence on the vital matters involved. On these facts he was entitled to no leniency at the hands of the court. In such case it is usual to charge the trustee with the highest market value of the fund, and the highest rate of interest allowable by the law of the land, and to disallow all claims for services for care of the property not accounted for. *Farwell v. Steen*, 46 Vt. 678. If any other rule should be adopted, all an administrator, or executor, or other trustee, would have to do to cover up his gains on the trust property, would be to remain silent when called upon to render an account of his stewardship. There was no error in charging him interest on this item. The charge for personal services on the farm after it had passed into the possession and control of the life-tenant, Chandler Wakefield, were properly disallowed. They were not performed for the benefit of the estate, but for the benefit of the life-tenant, who should pay for them, if any one.

The judgment of the County Court is affirmed.

NOTE.—As to liability of executor for investments and for acts of co-executor, see *Ormiston v. Olcott*, *infra*; *McKim v. Aulbach*, *infra*, and note. See also *Troup v. Rice*, 1 Am. Prob. R. 18; *Ward v. Kitchen*, Id. 355.

NEWTON vs. SEAMAN'S FRIEND SOCIETY.

[180 Massachusetts, 91.]

INCORPORATING PAPER IN WILL BY REFERENCE.

If a will, duly executed and witnessed, incorporates in itself by reference a paper not so executed and witnessed, containing directions as to the disposition of the testator's estate, such paper, if in existence at the date of the will and clearly identified as the paper referred to, is a part of the will, and should be admitted to probate as such.

The Probate Court, after admitting a will to Probate, and after the time for appealing from the decree has passed, may admit to probate a paper referred to in the will, and which in law forms part of it, and which by mistake was not presented to the court when the will was admitted to probate.

APPEAL from a decree of the Probate Court, admitting to probate a book as part of the will of Alexander De Witt.

On February 4, 1879, his will and four codicils were admitted to probate, and William Newton and Charles A. Angell were appointed executors. On June 3, 1879, they presented a petition to the judge of probate, setting forth that the second clause of the third codicil of the will was as follows: "I revoke that part of my will which gives directions for the payment of my legacies, and order and direct my executors or the survivor of them to pay the several legacies mentioned in my wills and codicils, as near as possibly convenient, according to the directions written in a book by Melvin W. Pierce, signed by me, Alexander De Witt, and witnessed by said Melvin W. Pierce;" that the petitioners had the book referred to in their possession, but did not offer it for probate with the will because they did not think it necessary to have it admitted to probate; that the book filed with the petition was the book referred to in said codicil, and was in existence at the time of the making of said codicil; and praying that the same might be admitted to probate as part of the will of Alexander De Witt.

On this petition, after due notice to all parties interested, the judge of probate ordered a decree to be entered, which, after reciting that it appeared that a part of the directions in said book, to wit, the writing on the cover and on certain spec-

ified pages thereof, with the exception of certain specified words and figures on two of those pages, were a part of the will of the deceased, namely, of the third codicil thereto, and that the same, being written and signed by the deceased and witnessed by Melvin W. Pierce at the time of the execution of said codicil, was legally executed, ordered that the aforesaid parts of the book, and the directions written therein and signed by the deceased, be allowed as part of the third codicil and of the last will of the deceased.

From this decree two of the legatees appealed to this court, assigning as reasons of appeal that the book was not a part of the will and codicils; and that it was offered for probate too late.

At the hearing of the appeal, the parties agreed that the facts set forth in the petition of the executors were true; and that the only other facts material to the determination of the case were as follows: On the cover of the book were written the following words, signed by the testator, and witnessed by Melvin W. Pierce: "Directions to my executors in the way and manner I wish all the legacies to be paid as near as possibly convenient. Should I dispose of any of the property herein named before my decease, I order and direct my executors to make up the legacies in stocks or other securities or cash, as they may think best." The book contained several pages of instructions as to paying, in specific property, legacies given in the will and codicils, comprising twelve classes or divisions of instruction, each division being signed by the testator and witnessed by Pierce. The book further contained two entries, by way of marginal note and interlineation by the testator after the execution of the third codicil, which consisted of the words and figures excepted in the decree of the Probate Court; and also a list of property not disposed of on the testator's eightieth birthday, at the end of the book and wholly distinct from the instructions, which was not offered for probate nor mentioned in that decree. With these exceptions, the whole book was admitted to probate in the court below, and was in its present form at the times of the making of the codicil and of the testator's death.

The case was reserved by Gray, C. J., at the request of both parties, for the consideration of the full court, and for the entry of such decree as law and justice might require.

W. W. Rice & S. Haynes, for the appellants.

W. S. B. Hopkins, for the appellees.

GRAY, C. J. If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such. *Allen v. Maddock*, 11 Moore's P. C. 427; *Singleton v. Tomlinson*, 3 App. Cas. 404; *Jackson v. Babcock*, 12 Johns. 389; *Tonnele v. Hall*, 4 Comst. 140; *Chambers v. McDaniel*, 6 Ired. 226; *Beall v. Cunningham*, 3 B. Mon. 390; *Harvy v. Chouteau*, 14 Mo. 587.

In *Loring v. Sumner*, 23 Pick. 98, 102, Mr. Justice Morton said, "There is no doubt that a valid bequest or devise may be made by reference to objects and documents not incorporated in or annexed to the will." In that case the will contained this clause: "I have given to my son, Nathaniel Loring, Jr., one thousand dollars by note for his full part of my estate." It was held that this was a valid legacy of the sum of \$1,000, although the note had no validity as a note, for want of consideration, and had not been made with any testamentary intent. It is true that the amount of the legacy there appeared on the face of the will. But in *Wilbar v. Smith*, 5 Allen, 194, this feature was wanting; the testator, having signed and delivered to four of his children respectively promissory notes which were without consideration and ineffectual as gifts *mortis causa*, on the same day made his will, by which, after various pecuniary legacies to other children and grandchildren, he gave to the four children "an equal proportion with" the others, "each to have in the same proportion as I give in this

will, together with the notes of this date to" the four children; and it was held that the four took specific legacies of the amounts of the notes. And in *Thayer v. Wellington*, 9 Allen, 283, 292, it was said by the court, "A testator may refer expressly to a paper already executed, and describe it with such particularity as to incorporate it virtually into the will, or he may refer to deeds or other instruments, or monuments, or existing facts, to which reference may be had in construing his will."

In *Allen v. Maddock*, above cited, a codicil headed, "This is a codicil to my last will and testament," was duly executed, and attested in 1856; upon search among the papers of the testatrix after her death, there was found, inclosed in a sealed envelope on which were written the words "Mrs. Ann Foote's will," a will executed by her in 1851, but not so attested as to have any validity as a will, and no other testamentary paper of any description was found. Mr. Pemberton Leigh (afterwards Lord Kingsdown) delivered the judgment of himself, Dr. Lushington, Sir Edward Ryan and Sir Cresswell Cresswell, affirming the decree of Sir John Dodson, reported in Deane, 325; and, upon an elaborate review of the authorities, holding that this will was sufficiently identified as the last will referred to by the codicil of 1856, and was incorporated with and made valid by that codicil, and that the two should be admitted to probate as together constituting the last will and codicil of the testatrix, although, as was observed in the judgment, since the St. of 7 W. IV & 1 Vict. c. 26 (as under our Gen. Sts. c. 92, § 6), "no paper not properly executed and attested can, in strictness, be for any purpose a will or codicil."

Several decisions of Sir Herbert Jenner Fust since the statute, not referred to in that judgment, are to the like effect. For instance, where a widow made a will devising and bequeathing all her real and personal estate upon the trusts expressed in the will of her late husband, which she described by its date and as having been afterwards revoked, it was held that the revoked will of her husband should be admitted to probate as part of her will. *Goods of Durham*, 1 Notes of Cases, 365; s. c. 3 Curt. Eccl. 57. So where a testator left proper-

ty to his eldest son, in trust for himself and the other children as expressed in an indenture of settlement made between him and the testator two years before, it was held that the indenture was part of the will, but that, as the original indenture ought to be retained by the trustee, a notarial copy should form part of the probate. *Goods of Dickins*, 1 Notes of Cases, 398; s. c. 3 Curt. Eccl. 60. And where a testator left a will and codicil, and on the first page of the will referred to "the paper hereunto annexed, as a further distribution of my effects," and at his death the will and codicil were found in a sealed packet, and attached to the will by a pin was a paper containing such a disposition and stated by the testator to be the paper referred to in the will, this paper was admitted to probate as part of the will. *Goods of Willesford*, 1 Notes of Cases, 404; s. c. 3 Curt. Eccl. 77. See also *Goods of Bacon*, 3 Notes of Cases, 644; *Goods of Smartt*, 4 Notes of Cases, 38.

In *Dickinson v. Stidolph*, 11 C. B. (N. S.) 341, a testatrix, on August 27, 1819, made a will executed and attested in the manner required to pass both real and personal estate, making specific devises and bequests, containing no residuary devise, appointing an executrix, and "revoking all former wills, excepting two memorandums dated May 10, 1819, which are to remain in force with this my last will." After her death, one memorandum only dated May 10, 1819, was found, which was signed by her and attested sufficiently for a will of personal property, but not for a will of real estate, and which, though not styling itself a will, purported to dispose of her property, without mentioning whether it was real or personal. This memorandum was admitted to probate with the will, but by the law of England was not thereby established as to real estate. But, in an action at law to try the title to the real estate, it was held, after advisement, in a judgment delivered by Mr. Justice Williams (the author of the Treatise on Executors, and a master of the law of wills) in behalf of himself and of Chief Justice Erle and Justices Willes and Byles, that the memorandum was incorporated in and republished by the will, and operated on the real estate of the testatrix.

In *Quihampton v. Going*, 24 Weekly Rep. 917, a testator

by his will declared, for the information of his trustees, that the amounts or values entered on a certain page of his ledger, dated fourteen days earlier than the will and signed by him, were the only advancements, either by way of gift or loan, previously made by him to any of his children. Sir George Jessel, M. R., held that the entries so signed on that page of the ledger must be regarded as part of the will, and conclusive for the purposes of the will, although the sums entered therein differed from those in fact received by the children.

The cases of *Smart v. Prujean*, 6 Ves. 560; *Wilkinson v. Adam*, 1 V. & B. 422; *Dillon v. Harris*, 4 Bligh's N. R. 321, and *Croker v. Hertford*, 4 Moore's P. C. 339, merely show that clear proof of the identity of the paper referred to, and of its existence at the time of the execution of the will, is essential, and was not made to the satisfaction of the court in those cases.

It is usual and proper, though not absolutely necessary, that a paper sufficiently referred to, and in existence at the date of the will, and clearly identified, should be set out in the probate; and this should always be done when the executors desire it, and the paper is in their possession, in order that the entire disposition of the estate may appear upon the record. *Sheldon v. Sheldon*, 3 Notes of Cases, 250; s. c. 1 Rob. Eccl. 81; *Goods of Sibthorp*, L. R. 1 P. & D. 106; *Bizzy v. Flight*, 3 Ch. D. 269; *Quihampton v. Going*, above cited.

In the present case, the testator by the third codicil expressly revokes that part of the will which gives directions for the payment of legacies, and orders and directs his executors to pay the legacies mentioned in his will and codicils as nearly as may be according to the directions written in a book by Melvin W. Pierce, signed by the testator and witnessed by Pierce. The book admitted to probate contains such directions, so written, signed and witnessed, specifying the property out of which each legacy is to be paid; and, with the exception of two memoranda in the margin, which were excluded from the probate, is agreed by the parties to have been in its present form at the time of the making of the third codicil. There is no doubt, therefore, of the identity of the document referred to, nor of

its existence at the date of the execution of the testamentary instrument which refers to it.

The fact that the book was in the possession and control of the testator might require a close scrutiny of the evidence that it remained in the same condition as at the time of the execution of the codicil, if there were any controversy upon that point, but is otherwise immaterial. It is not necessary that every portion of a will should be verified by the signature of the testator and the attestation of the witnesses; it is sufficient that the different sheets or papers should clearly appear upon their face, or by extrinsic evidence, to have formed part of the will at the time of its execution and attestation. *Ela v. Edwards*, 16 Gray, 91, 99; *Marsh v. Marsh*, 1 Sw. & Tr. 528.

The document in question, which was in law part of the will, having by mistake not been presented for probate with the will, the Probate Court had, and rightly exercised, the power to admit it to probate afterwards. *Waters v. Stickney*, 12 Allen, 1; *Musser v. Curry*, 3 Wash. C. C. 481.

Decree affirmed.

Will consisting of distinct papers.—1. *Reference of the papers to one another.* "There can be but one last will, and yet several papers in harmony with each other may, when taken together, constitute the last will." *Van Wert v. Benedict*, 1 Bradf. Surr. R. (N. Y.) 114, 119. "It is sufficient that they are connected by their internal sense, by coherence or adaptation of parts." *Wikoff's Appeal*, 15 Penn. St. R. 281, 290.

If reference be made expressly to a paper already written (see *In goods of Sunderland*, L. R. 1 P. & D. 198; *In goods of Yockey*, 29 L. T. [N. S.] 699), if the testator "has" remarks Jewett, J., in *Tonnele v. Hall* (cited in principal case), "so described it, that there can be no doubt of the identity," and the will be properly executed, "that paper," says the learned judge, adopting the principle laid down in *Habergham v. Vincent*, 2 Vesey, Jr., 228, "whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it." See also *Church v. Brown*, 21 N. Y. R. 315, see p. 380; *Ludlum v. Otis*, 15 Hun (N. Y. Supreme Ct. R.), 410.

In *Thompson v. Quimby*, 2 Bradf. Surr. R. 449, it is said that "reference may be made in a will to another document for purposes of description, but there can be no valid testamentary dispositions unless contained in the will; and the testator cannot, in his will, reserve the power of giving, or declare that he does give by an instrument not formally executed according to the provisions of the statute." In this case, the will offered for probate be-

queathed certain personal effects said by the will to be "specified or enumerated in a certain schedule accompanying this, my will, and which is signed by me * * to the respective parties named in said schedule, and in the proportion as therein designated."

But the schedule was never attached to the will, nor did the testator declare such schedule to the witnesses to be his will. Compare *In goods of Stewart*, 4 S. & T. R. 211.

As the reference in the will to another paper must be to some paper then existing, a will giving a portion of the testatrix's property to her nephew to dispose of as she should communicate to him by letter, could not thus incorporate a paper containing directions, found after testatrix's death, in the envelope with the will, and of even date with such will. *In goods of Sims*, 16 W. R. 407; see *Johnson v. Clarkson*, 3 Rich. Eq. (S. Ca.) 805. But a testator may, in his will, direct that any payments which shall be made by him to a legatee, subsequently to the execution of the will, and which shall be entered by the testator in his books of account, are to be deducted from the amount bequeathed to such legatee in the will. *Langdon v. Astor's Executors*, 16 N. Y. R. 9.

The reference in the will must be sufficiently clear to justify an inference. *In goods of Tovey*, 47 L. J. (N. S.) P. & D. 68; *In goods of Brewis*, 3 S. & T. R. 478; *In goods of Luke*, 11 Jur. (N. S.) 397; *Grabill v. Barr*, 5 Penn. St. R. 441.

Thus, *In re Norris*, 14 W. R. 848, Sir J. P. Wilde says: "There are two codicils in this case, and both refer to a will. The question then is, do they refer in such terms that I can infer to what will they refer."

In *Bailey v. Bailey*, 7 Jones' L. (N. Ca.) 44, it appeared that in 1841 a testator had executed two deeds of gift to Samuel Bailey, and had placed them in the hands of one Boggan, with instructions to hold them until the testator should call for them. He failed to call for them, and they remained in Boggan's hands until the testator's death.

The will of the latter, executed in 1844, read, "I give and bequeath to my son, Samuel Bailey, in addition to what I have given him by deed of gift," &c.

Ejectment was brought, one of the deeds of gift being of land. "As there was no delivery of the instrument to make it operate as a deed," remarks Battle, J., "another question arises: was it so operated in the alleged donor's will as to make it operate as a devise of the land to the defendant? It is very clear that the clause of the will relied upon for that purpose, cannot have that effect. There is no particular deed of gift described, or referred to, and, therefore, the uncertainty and ambiguity is patent upon the face of the will, and cannot be aided by parol proof." The judge cites *Chambers v. McDaniel* (cited in the principal case).

Where a testator bequeathed to a certain person some household furniture, "which she has got a list of," and on the application for probate this person produced a list which, however, did not correspond with the one mentioned in the will, and which list she testified to having received from the testator previous to the will being made, with directions to keep it, Sir C. Cresswell

said: "The question to be decided is not whether there are grounds for conjecturing that the testator referred to the list produced, but whether it is proved by legitimate evidence that he did so."

The learned judge expresses an unwillingness to extend the principle of *Allen v. Maddock* (cited in principal case). *In goods of Greves*, 1 S. & T. R. 250.

Allen v. Maddock was approved in the late case of *In goods of Heathcote*, L. R. 6 P. Div. 30.

In this case, a wife having power, in the event of her husband surviving her, to dispose by will of their settled property, exercised the power during his life-time. She surviving him, the power failed of effect, and the will thus became invalid.

After she had become a widow, she executed a codicil, which, as well as the will, was in her own handwriting, and was written on the same piece of paper as the will, immediately after it. The only reference to the will made in the codicil was the beginning, which read, "this is a codicil to the last will and testament of me," &c.

It was agreed among the parties in interest that no later will had been made.

Sir James Hannen, President, said that the court must determine the meaning of the reference made in the codicil, and what, if any, instrument found at the testatrix's death, is thereby referred to, the question of the existence of any such instrument being one of fact to be explained by parol evidence. And he continues, "it must be shown what papers there were at the date of the codicil which could answer the description contained in that document, and the court having by these means placed itself in the situation of the testatrix, and acquired, as far as possible, all the knowledge which she possessed, must say, upon a consideration of those extrinsic circumstances, whether the paper is identified or not."

The will was admitted on the agreement just mentioned. See *In goods of Almonino*, 1 S. & T. R. 508.

A validly executed codicil so confirms a will, that a provision in the will disposing of property according to a manner to be thereafter specified, is by the codicil rendered valid if the manner has been so pointed out at the time of the execution of the codicil. *In goods of Stewart*, 4 S. & T. R. 211; *In goods of Truro*, L. R. 1 P. & D. 201; compare *In goods of Reid*, 38 L. J. (N. S.) P. & D. 1.

A valid objection to the execution of a codicil is removed by the recognition and confirmation of this codicil in a later codicil. *Pollock v. Glassell*, 2 Gratt. R. (Va.) 439, see p. 468.

In *Storms' Will*, 3 Redf. Surr. (N. Y.) R. 327, it appeared on the probate of a will, that one of the subscribing witnesses could not be produced or his absence sufficiently accounted for.

To this will there was a codicil commencing, "Whereas I, * * have made my last will and testament bearing date the 7th day of January, 1871, in and by which I have given and bequeathed to Mahala J. Gilbert the sum of \$400" (which sum was so given by the will, which bore the date recited),

"now therefore I do, by this my writing, which I hereby declare to be a codicil to my said last will and testament, and to be taken as a part thereof," &c.; and this codicil concluded as follows: "And lastly, it is my desire that this codicil be annexed to and made a part of my last will and testament, as aforesaid, to all intents and purposes."

It was held by the surrogate that, execution of the codicil being duly proved, both will and codicil might be admitted to probate.

See, however, *Proctor v. Clarke*, 3 Redf. R. 445. The opinion, in this case, seems to proceed on an excessively close construction of certain statutory provisions. So far as it may conflict with the decision in *Storms' Will*, it does not appear to lay down the better doctrine.

2. *Embodying in a probate, documents referred to in a will.* "The whole subject * * * is difficult and embarrassing." Sir C. Cresswell, in *In goods of Marquis of Lansdowne*, 3 S. & T. R. 194. It is intimated in this case that if the executors require knowledge of the contents of the documents to perform their duties, the documents ought to be embodied in the probate. The question in the particular instance was of some moment on the score of convenience, since leaseholds were in the will bequeathed to trustees upon trusts declared in an indenture of settlement of great length, the trusts therein occupying about one hundred and fifty folios.

George Peabody, a domiciled American, died in London, leaving a will executed in the United States.

In this will he appointed two sets of executors, describing one set as his London executors, the other as his American executors. The London executors were directed to realize the estate in England, and after payment of certain legacies, to transmit the residue to the American executors. The latter were directed, after a certain term, to distribute all the realized, &c., estate according to a certain family deed, executed in the United States, and appointing other trustees.

Probate in England was allowed without incorporating this deed, an affidavit to be filed identifying the deed by date and names of trustees, and also an affidavit that the will was valid according to the law of the United States. *In goods of G. Peabody*, 21 L. T. (N. S.) 780. See also *In goods of Cole*, 20 L. T. (N. S.) 758.

His original will being in India, a testator executed (apparently in Scotland) a codicil referring to it, and made a copy of the will, which copy he showed to the witnesses to the codicil, and informed them was a copy, and wrote upon it, "This is the copy of my will or testament referred to in the codicil signed by me this 21st day of August, 1869. G. G. Mercer." Two later codicils were executed.

It was held that the codicil incorporated the copy of the will, and the copy was accordingly admitted to probate with the other papers. *In goods of Mercer*, 39 L. J. (N. S.) P. & D. 43. See *Gerrish v. Id.* 1 Am. Prob. R. 59.

STOKES *vs.* PAYNE.

[58 Mississippi, 614.]

POWER TO SELL NOT ONE TO MORTGAGE.

Testatrix empowered her husband "to sell and dispose of" her property, which she devised to her children—"when it shall appear to him to be advisable so to do, having an eye to the support and education of the children." *Held*, that no authority to mortgage the property was conferred—a conversion only was permitted.

THE facts are set out in the opinion of the court.

Raymond Reid, for the appellants.

J. D. Eads and *O. A. Luckett, Jr.*, for the appellees.

COOPER, J. By her will Mrs. A. P. Stokes gave her lands to her children, and conferred upon her husband, M. M. Stokes, power to sell the same, in the following words: "And I hereby authorize and empower said M. M. Stokes to sell and dispose of any of the property hereby bequeathed in this will, when it shall appear to him to be advisable so to do, having an eye to the support and education of the children." After the death of Mrs. Stokes, M. M. Stokes mortgaged the land to secure the payment of an account for family supplies necessary for the support of the children, which were sold to him on the faith of the security afforded by the mortgage. The mortgagees filed this bill against the children of Mrs. A. P. Stokes to subject the land to sale for the payment of the account. From a decree in favor of complainants this appeal is taken.

In *Sessions v. Bacon*, 23 Miss. 273, it is held that, under the act of 1839, relative to the power of married women over their estates, a married woman having authority to sell takes by implication the power to mortgage; and since this decision such has been the well-settled rule. The decision in that case, we think, was correct. The law had conferred upon married women capacity to take, hold, and dispose of legal estates; to

make certain contracts relative thereto, which might be enforced against their separate estates by action at law as well as in equity; to sell and convey the property owned by them, their husbands joining in the deed when real estate was conveyed. The beneficial interest in the property was in the woman, and the object of the legislature was to permit her to deal with it as owner, subject to such restrictions and limitations as the statute preserved or established to prevent improvidence or coercion. The powers conferred were given to married women as a class, and the courts, in construing the statute, looked to the policy of the law and the intention of the legislature, as gathered from other provisions *in pari materia*, and held that the power to sell conferred on her included the power to mortgage.

We have examined a large number of the very numerous cases in which the rule as to the extent, construction, and execution of powers has been examined and explained. The fundamental principle that the donee of the power is authorized to exercise it only to the extent and in the manner specified, is recognized in all the cases; but the application of the equally well established rule that courts of equity, in determining whether or not the thing done is within the power conferred, will look to the ends and designs of the parties, and will aid defective executions of powers, has led to diverse and conflicting adjudications. In the cases of *Allan v. Backhouse*, 2 Ves. & Bea. 65; *Mills v. Banks*, 3 P. Wms. 1; *Ball v. Harris*, 4 Myl. & Cr. 264; *Pennsylvania Ins. Co. v. Austin*, 42 Pa. St. 257; *Wayne v. Myddleton*, 2 Ga. 383; *Williams v. Woodward*, 2 Wend. 492; and *Watson v. James*, 15 La. An. 386, the power to mortgage has been held to be implied in powers to raise portions out of rents and profits, or to sell.

Such power has been denied in *Stone v. Theed*, 2 Bro. C. C. *243; *Holdenby v. Spofforth*, 1 Beav. 390; *Page v. Cooper*, 16 Beav. 400; *Devaynes v. Robinson*, 24 Beav. 86; *Stronghill v. Autrey*, 1 De G., M. & G. 635; *Shaftesbury v. Duchess of Marlborough*, 2 Myl. & K. 111; *Coutant v. Servoss*, 3 Barb. 128; *Albany v. Fire Ins. Co.*, 4 Comst. 9; *Cumming v. Williamson*, 1 Sandf. Ch. 17; *Wood v. Goodridge*, 6 Cush.

117; *Patapsco Guano Co. v. Morrison*, 2 Woods, 395; *Head, Admr. v. Temple et al.*, 4 Heisk. 34; *Hubbard v. German Congregation*, 34 Iowa, 34; and *Bloomer v. Waldron*, 3 Hill, 361 (overruling *Williams v. Woodward*, 2 Wend. 492).

In *Stronghill v. Autrey*, Lord St. Leonards, after an examination of many of the English cases, said: "My own opinion is that, generally speaking, a power of sale out-and-out, or for a purpose, or with an object beyond the raising of a particular charge, does not authorize a mortgage; but that when it is for raising a particular charge, and the estate is settled or devised subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the court will support it as a conditional sale—as something within the power."

A more liberal construction is made in those cases in which the person who has the power is also interested in the estate on which it is to be exercised, than in those in which the power is given to one to incumber the property of another. In the one case the power is to be liberally, in the other strictly, construed. *Sayles v. Freeland*, 2 Vent. 350.

Cumming v. Williamson, 1 Sandf. Ch. 17, illustrates both the principle that no other power than that delegated can be exercised, and the other principle that a substantial execution is sufficient. Several persons, owners of some lots of land in New York, appointed an agent and authorized him to improve the property, and to raise money for this purpose by mortgage of the lots. The agent employed certain persons to do the work necessary on the lots, but, failing to raise money, he mortgaged the lots to the contractors to secure the debts due them. It was held that the object intended to be accomplished has been effected, and the mortgage was valid; but one of the donors of the power was himself a mere trustee under a marriage settlement, by which he was authorized to "grant, bargain, sell, alien, and convey in fee-simple any of the property, and to invest the proceeds in stocks, etc., whenever the beneficiary minded to have it done," and it was held that this power did not authorize him to mortgage, and therefore he could not so authorize the agent who did mortgage the

property; and as to the interest of the trustee under the marriage settlement the mortgage was held void.

An examination of the authorities has impressed us with the correctness of those decisions which hold that, as a general rule, mere power to sell does not include the power to mortgage. In most of the cases in which such power has been declared, it is stated to be because a mortgage is a sale on condition. In this State, as in many others, a mortgage is now treated at law as in equity—as a mere security for a debt. The legal estate can only be used for the purpose of enforcing the payment of the debt secured. The words of the testatrix conferring the power on her husband are, to “sell and dispose of” the property, and evidence, we think, an intention on her part simply to authorize a conversion of the property into money by an out-and-out sale; and under this power the husband was not authorized to execute the mortgage.

The decree is reversed and bill dismissed.

NOTE.—To the same effect, see *Hoyt v. Jaques*, 1 Am. Prob. R. 157.

UPDYKE vs. TOMPKINS.

[100 Illinois, 406.]

WILL SPEAKS FROM TIME OF DEATH.—DIRECTION TO CANCEL NOTES “I HOLD.”

Testatrix, after stating “I hold a number of notes against my brother,” directed that in a certain contingency a specified note should be cancelled and on other events happening, a like disposition should be made of all other notes, held, that this language only applied to notes held at the time of making the will, and not to those subsequently acquired.

As a general rule a will speaks from the death of the testator, but this is otherwise when language is used which repels the presumption.

THE facts are set out in the opinion.

N. W. Green & Wm. Dow Mans, for the appellant.

William E. Hughes & L. Dearborn, for the appellees.

WALKER, J. Two clauses of the will of Martha M. Updike are presented for construction by this record. The third clause is this: "If I survive my mother, Mary A. Updike, it is my will that my estate, real and personal, shall descend and be distributed in the same manner as intestate estates descend and are distributed under the laws of Illinois." And this is the fourth: "I hold a number of notes against my brother, George W. Updike, —one of these notes is for \$900, and I intend that one to be cancelled absolutely at my death, and given up to him. As to the others, if I survive mother (Mary A. Updike), then at my death I want all the other notes cancelled and surrendered to George W. Updike, but if mother survives me, then George must pay the interest on the other notes until her death, and then the other notes are to be cancelled and surrendered to him, the said George; and I will that said \$900 note shall be given up as aforesaid, and I declare that said George W. Updike, in case I survive my said mother, shall inherit equally in all my estate with my other heirs, notwithstanding the cancelling and surrendering of the said notes, his full share therein."

At the time of her death testatrix held six notes against George W., aggregating \$2,278 53. But the \$900 note spoken of in the will had been surrendered to him before the death of testatrix, and she only held one note of \$1,000, dated July 1, 1876, given before the will was executed. The will bore date the 23d of September, of that year, and testatrix survived her mother, and died May 24, 1880, and George W. qualified as executor of the will, and reported these notes, but claimed they were cancelled by the terms of the fourth clause of the will.

It is conceded that the \$1,000 note dated July 1, 1876, was cancelled, but it is claimed that as the other five notes were not in existence when the will was written and executed, but were afterwards given, they are not embraced in the clause requiring a cancellation,—that such notes only as were then in existence were in the mind of testatrix, and that George W. is required by the law to pay and account for all of the notes except that for \$1,000. The circuit and appellate courts took this view of the case, and it is brought by appeal from the lat-

ter court to this, and a reversal is urged on the ground that the Appellate Court adopted a wrong construction of the clause.

The general rule is, that a will is held to speak from the death of the testator. To this there is, however, the limitation, that when language is used which repels the presumption, it is otherwise, and in determining that question the entire will must be considered, with the specific language employed in the clause being construed, to find the true intent of the testator. Particular expressions will not control where the whole tenor or purpose of the instrument forbids a literal interpretation of the specific words. Wills, like deeds, contracts and enactments, must be construed according to the intent of the maker, and that must be ascertained from an examination of the instrument and all of its provisions, without the aid of extraneous testimony.

In this case the purpose of the testatrix is by no means clear and certain. The third clause seems to be free from ambiguity, but the difficulty arises in determining the true meaning of the fourth. Did testatrix intend to have both the notes she held at the time of making the will, and such as she might subsequently take from George W., cancelled and surrendered, or only the notes she then held? The question now before us is one of first impression in this court. It has, however, been frequently before the courts of Great Britain, and has been determined by several courts in the States of the Union. From them is deduced the rule above stated. Of the correctness of the rule there seems to be no question, but the difficulty arises in its application to cases as they arise.

Testatrix speaks of notes she had when she executed the will, and there is no allusion to other notes she might afterwards hold against George W. Updike. There is nothing in the will from which it may be inferred that she then supposed she would ever hold other notes on him. Had she supposed she would, it is but reasonable to believe she would have specifically disposed of them. We have no right to enter the domain of conjecture, but must be confined to the language employed. It can, according to the generally received mean-

ing of words, only be applied to the notes she then held. The import of the language employed can only embrace notes then in existence. The fourth clause only embraces and provides specifically for the notes she then held.

The doctrine is firmly settled and uniform in its application, that where a specific article is bequeathed, its sale, loss or destruction cannot be replaced by substituting another article in its stead. It has been repeatedly held that where specific stocks are bequeathed, and are afterwards sold and another kind purchased with the proceeds, the latter do not pass by the bequest. And so with the bequest of a lease for a term of years, if it is afterwards surrendered and a new lease taken, the latter does not pass by the will. Where a specific article is bequeathed, another cannot be substituted, unless specifically required by the terms of the will. Here specific notes were required to be cancelled, and there is no power to extend the provision to other notes not named or even in existence when the will was executed.

It is, however, said, that after describing the \$900 note she requires all of the other notes to be cancelled on the contingencies named,—that she would not have used the plural instead of the singular number if she did not intend to embrace subsequently-acquired notes. This is plausible, but we think is not sound construction. The plural number must have been inadvertently used, as she was manifestly referring to the notes she then held on appellant. She begins the clause by saying: "I hold a number of notes against my brother, George W. Updike. One of these notes is for \$900, and I intend that one to be cancelled absolutely at my death and given up to him. As to the others, if I survive my mother, Mary A. Updike, then at my death I want all the other notes cancelled and surrendered," &c. What other notes? Clearly the other notes she then held. The words, "the other notes," can only refer to such as she had said she held,—the remainder of the notes above the \$900 note she then held. It is true that it is said she held but two notes, the \$900 and the \$1,000 notes. If this be true, it only shows the expression, "all the other notes," was inaccurately used, as she nowhere gives the slightest inti-

mation that she expected to have in the future any other notes of appellant, which no doubt would have been done had she intended to embrace future-acquired notes.

It is also urged, that one purpose of this clause was, if her mother survived her, to make provision for the support of her mother, and the interest on the \$1,000 note would have been so scanty that we must presume she intended the interest on a larger sum to afford such a fund. This position is answered by reference to the second clause of the will. By that clause she devised to her mother, in case she survived said testatrix, all of her estate, real and personal. From the amount of the notes she held on appellant, it appears that sum would have been an ample provision for the support of her mother. We cannot, therefore, infer from the bequest of the interest on this \$1,000, that the scheme of the will was to provide a fund arising from the interest on notes for the support of her mother, as she had made provision in the second clause of the will.

After a careful study of the will, we are satisfied that testatrix only intended to have the notes then held by her cancelled and surrendered, and not subsequently-acquired notes. And this construction is not only authorized, but is required by the books.

The decree of the Appellate Court is therefore affirmed.
Decree affirmed.

See *Stannard v. Barnum*, 1 Am. Prob. R. 160.

WARREN *vs.* TAYLOR.

[56 Iowa, 182.]

REVOCACTION BY CONVEYING PART OF PROPERTY DEVISED.

Where the testator undertakes to dispose of both real and personal estate and he subsequently conveys the real estate, it will not, in general, work a revocation of the will as to the personal property owned by him at his death.

THIS is an action in equity, the object of which is to require the defendants to pay to the plaintiff a legacy of \$500, with interest, which it is alleged is due to the plaintiff from the defendants under the provisions of the last will and testament of John Taylor, deceased. There was a decree in accord with the prayer of the petition. Defendants appeal.

M. H. Jones & Son and *Trimble, Carruthers & Trimble*, for appellants.

Payne & Eichelberger, for appellee.

ROTHROCK, J. In the year 1852, John Taylor, who was then a resident of Lee county in this State, made his last will and testament, which was as follows :

"First. I give and bequeath unto my wife, Elizabeth Taylor, all my lands and town lots situated in said county (Lee) and State, with all the privileges and appurtenances thereon or in any wise appertaining, and also give and bequeath unto my said wife all my personal property, of every description and kind whatsoever. To have, to hold and to use the said property, both real and personal, during her lifetime, and at her decease said real property, and so much of my personal property as remains, I give and bequeath unto my daughter Frances Patterson, and to my son John H. Taylor, share and share alike, by their paying to my granddaughter, Maria Taylor, five hundred dollars when she arrives at the age of eighteen years, and to my grandson, Lewis Taylor, the sum of five hundred dollars when he arrives at the age of twenty-one

years, and also to my granddaughter, Sylvia Payne, the sum of five hundred dollars when she arrives at the age of eighteen years, and if either the said Lewis Taylor or the said Maria Taylor die before arriving at full age, then the surviving one is to receive the share of both, and in case my granddaughter Sylvia Payne dies before arriving at full age, her share is to descend to her next oldest brother or sister, if she should have any, and if she should die having no brother or sister to heir her said share, then and in that case I will and bequeath said share to my daughter, Frances Patterson, and to my son John H. Taylor, share and share alike."

Plaintiff is the granddaughter, Sylvia Payne, mentioned in the will, she having since married Clark B. Warren. She was born in 1851, and is now past eighteen years of age. At the time of making the will said John Taylor was the owner of certain lands and town lots in Lee county, which he afterwards sold for \$8,550, in cash. At the time of the sale he had about \$700 in value of personal property, moneys and credits. After the said sale Taylor removed to Davis county, and there invested a part of his money in land and town lots. The balance he received from the sale of his real estate in Lee county was loaned out, and his property was in this situation at the time of his death, which occurred in the month of August, 1868. At his death his widow succeeded to the possession of all his estate, consisting of real estate and personal property, the latter being mostly in notes and demands against third persons.

Elizabeth Taylor died intestate in December, 1878, leaving personal property to the amount of \$9,000 or thereabouts. This property was that left by her husband and the accumulations thereof after his death. Actions were commenced against the said Frances Patterson and John H. Taylor, the residuary devisees under the will, by Maria Taylor, one of the legatees. In this action Elizabeth Payne, a daughter of the testator, was made a party defendant, and it was claimed by the plaintiff in the action and by said Elizabeth Payne that they were entitled to share in the property of the testator as heirs. The said John H. Taylor and Frances Patterson in their answers in that

action claimed that whatever right the plaintiff therein had was under the said will. The action and claim of Elizabeth Payne upon the cross petition were compromised by the parties without a trial. The plaintiff herein was not a party to that action, and as we understand the record John H. Taylor and Frances Patterson claim all of the estate, to the exclusion of the plaintiff and all other persons.

It is contended by the defendants that the sale of the land and town lots in Lee county by the testator worked a revocation of the will.

It is true that the defendants, after the sale of the real estate, could not take it under the will. But the legacy of the plaintiff did not depend upon the defendants taking the real estate as devisees. The will by its terms provided that the widow should have a life estate in the real and personal property, and that the defendants should take the whole of the estate by their paying the specific legacies to the plaintiff and the others named. The defendants claim, however, that although the personal estate at the death of the widow was of the value of about \$9,000, they held the same as heirs and not as residuary legatees. This position seems to us to be unsound. Although the will by the act of the testator ceased to be operative, or rather never became operative, as to the real estate in Lee county, this did not work a revocation as to his personal estate. Where a testator undertakes to dispose of both personal and real estate and he subsequently conveys the real estate it will not, in general, work a revocation of his will as to the personal property of which he dies seized. The conveyance of a part of the estate devised works a revocation *pro tanto* only. 1 Redfield on Wills (fourth ed.), page 339; *Zimmerman v. Zimmerman*, 23 Pa. St. 375. It will be observed that the will does not limit the disposition of the personal estate to that which was owned by the testator at the date of the will. It clearly contemplates a disposition of all the personal property of the estate at the death of the widow, from whatever source obtained. Now when the defendants assert their right to this property it must be as residuary legatees after the pay-

ment of the specific legacies to the plaintiff and others named in the will.

We think the Circuit Court correctly held that the defendants took the estate charged with the payment of the legacy to the plaintiff.

This disposition of the case renders it unnecessary to dispose of the motion filed by the appellee.

Affirmed.

JUDY vs. GILBERT.

[77 Indiana, 96.]

LATENT AMBIGUITIES.—CORRECTION OF.

Mistakes apparent upon the face of a will may be corrected, but not mistakes claimed to arise solely on extrinsic evidence.

Testator owned only "the northeast quarter of the southeast quarter" of a certain section of land. In his will he devised "the northeast quarter of the southwest quarter" of the same section to his wife for life, remainder to her children. *Held*, that parol evidence was inadmissible to show that the land actually owned was purchased by testator with money borrowed from his wife under a promise to devise the same to her and her children, and that he intended so to do in his will.

G. M. McDonald, G. A. Cutting, and Mr. Ballou, for appellants.

J. D. Ferrall, for appellee.

ELLIOTT, C. J. A single error is alleged, and that is assigned upon the ruling sustaining appellee's demurrer to the complaint of the appellants. The material facts stated as the cause of action may be thus summarized: John Hall desired to buy a certain tract of land described as "The northeast quarter of the southeast quarter of section 29, township 37 north,

of range 11 east, situate in Lagrange County, Indiana." He borrowed money from his wife to buy the land, and promised her that if she would lend him the money he would devise the land to her for life and remainder in fee to her children; that in September, 1843, the testator was the owner of the land above described and of no other; that, pursuant to his agreement with his wife, he made his will, intending to devise to her the said land; that, by mistake of the draftsman employed to prepare the will, the land was wrongly described as "the northeast quarter of the southwest quarter of section 29, in township 37;" that the testator did not then own, nor did he at any time own, the land described in the will; that the widow of the testator took possession of the said northeast quarter of the southeast quarter of section 29, township 37, range 11 east, under the will; that she remained in possession until her death.

The appellants insist that the will conferred title upon the widow during life and remainder in fee to her children. This general position is based upon these propositions:

First. That a will must be construed so as to carry into effect the intention of the testator, and that it is clear that the testator intended to devise the land of which the widow took possession to her.

Second. That as the testator owned but one tract of land, and as the only error in the description consisted in writing the word "west" after the word "south," instead of the word "east," the misdescription should be corrected.

Of these in their order:

First. It is undoubtedly true that the intention of the testator must govern, but this intention must be gathered from the will itself. Parol evidence cannot be used to add to, or take from, the will. The instrument may be read by the light of surrounding circumstances, but its legal meaning and effect cannot be varied by parol evidence. This is a cardinal principle, and is, in truth, a rule without an exception. To permit evidence of the character insisted upon by appellants to control the plain and unambiguous words of the will, would be a direct violation of this elementary rule.

Second. Mistakes not apparent on the face of the will cannot be corrected by the court. Courts must construe and enforce wills as they are written. To undertake to correct mistakes upon extrinsic evidence would be to supply the place of written instruments with verbal statements, and would often result in the court's making the will instead of the testator. The position of appellant's counsel is, that the will should be treated, not as devising the land actually described therein, but as devising land of which the testator died the owner. In support of this position, counsel cite the case of *Cleveland v. Spilman*, 25 Ind. 95. In that case, the language of the testator was, "my land, being the south half of the northeast quarter of section 36, township 3 south, of range 12 east, I do * bequeath to my wife, Eliza." The court, in its opinion in that case, placed great stress upon the clause, "my land," and very properly, for these words were of themselves sufficient to carry the land then owned by the testator. The attempt to specifically describe the land did not make nugatory the general description. There was, in the case cited, no need of looking beyond the will, for the language used by the testator furnished all the needed information of the testator's intention. In *McAlister v. Butterfield*, 31 Ind. 25, the court held that mistakes in a will cannot be corrected by the courts, except in cases where the mistake is apparent upon the face of the will itself. The earlier case of *Judy v. Williams*, 2 Ind. 449, declares and enforces the same principle, and in the case of *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, the court approved the doctrine of the earlier cases. In the case last cited, the court quoted, with approval, from the opinion in *Jackson v. Payne's Ex'rs*, 2 Met. (Ky.) 567, the following: "The doctrine in regard to mistakes in wills is, that courts of equity have jurisdiction to correct them when they are apparent upon the face of the will, and must be such as may be made out by a proper construction of its terms, otherwise there can be no relief." In the case of *Bunnell v. Bunnell*, 73 Ind. 163, the doctrine of the cases cited was again approved.

The rule recognized by our cases is an old one, and is well supported by both the ancient and modern authorities. Lord

Coke, in *Cheyney's Case*, 5 Rep. 68, said: "In a devise of land by writing, an averment out of the will should not be received. For a will concerning land ought to be in writing, and not by any averment of the same, otherwise it were a great inconvenience that not any may know by the written words of the will what construction to make, if it might be controlled by collateral averment out of the will." The cases cited by appellant, holding a different doctrine from that approved by us, we think wrong in principle, and in conflict with authority. Among the latter cases holding the same doctrine as that of this court may be cited *Bishop v. Morgan*, 82 Ill. 351; *Kurtz v. Hibner*, 55 Ill. 514; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *Reynolds v. Robinson*, 32 N. Y. 103; *Griscom v. Evens*, 1 Am. Probate Cases, 130.

There is no mistake upon the face of the will which is here the subject of investigation. There is no latent ambiguity. The property devised is accurately described. The claim is not that there is an inaccurate description apparent upon the face of the will, but that the testator ought to have described some other property. The court is asked to admit parol evidence to show, that, although the testator described with perfect accuracy one parcel of land, he meant another. The bare statement of appellant's position exposes its hostility to fundamental and salutary principles of jurisprudence.

It is argued that the parol contract set forth in the complaint should be specifically enforced and a conveyance of the land ordered to be made to appellant. Waiving all other objections to this argument, we state two which are fatal to its validity. The complaint is not so framed as to present a right to have specific performance of a contract. It presents only the question as to complainant's rights under the will of John Hall. A complainant cannot base his complaint upon one definite theory, and then claim a right to relief upon another. *Lockwood v. Quackenbush*, 83 N. Y. 607. If, however, the complaint were so framed as to make a case for specific performance, it is fatally defective. It shows a verbal contract for the conveyance of land, and one fully within the statute of frauds, but fails to show any part performance taking the case out of

the statute. In order to take such a case out of the statute, possession must be taken under the contract. It is not enough that possession is taken; it must be taken under the verbal contract and pursuant to its provisions. *Rucker v. Steelman*, 73 Ind. 396; *Neal v. Neal*, 69 Ind. 419. The complaint does not allege that possession was taken under the verbal agreement, but, on the contrary, shows possession under another and distinct claim.

Judgment affirmed, at costs of appellant.

Woods, J., absent.

See *Morse v. Stearns*, *infra*; *Griscom v. Evens*, 1 Am. Prob. R. 180; *Burnet v. Id.*, *Id.* 539.

CAULFIELD vs. SULLIVAN, PUBLIC ADMINISTRATOR.

[85 New York, 153.]

ELECTION TO TAKE UNDER WILL.—ESTOPPEL.—PUBLICATION OF WILL BY CODICIL.—PROBATE OF WILL IN FOREIGN LANGUAGE.

One who accepts of a devise or bequest does so on condition of conforming to the will, and he is bound to give full effect, as far as he can, to its legal dispositions.

Testator owning property in France and America made plaintiff, to whom he was indebted, his universal legatee on condition that "she executes the disposition" thereafter contained in his will, which subsequently bequeathed to his brothers all his property "in America, * * * without exception." *Held*, that plaintiff was bound to elect between her claim of indebtedness and the provisions of the will, and that the acceptance of the property in France barred such claim against the estate.

Where a codicil distinctly refers to and re-affirms a will, the provisions of the former may be treated as embodied in the latter, and both may be viewed as if executed and published at the same time.

Where a will is in a foreign language it is proper that the probate should contain a translation of the same in English.

Probate of a will, where the surrogate had jurisdiction, cannot be attacked collaterally.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 25, 1880, affirming a judgment in favor of defendant, entered upon the report of a referee.

This was a reference under the statute of a disputed claim against the estate of Henry Yelverton, deceased.

The material facts are stated in the opinion.

George Zabriskie, for appellant.

Charles W. Gould, for respondent.

EARL, J. Henry Yelverton, a citizen of this State, died in France, where he had resided for several years, on the 30th of September, 1873, leaving at his death a will executed in Paris on the prior 20th day of September, and a codicil thereto, executed three days thereafter. The will and codicil were subsequently admitted to probate in the Surrogate's Court of the county of New York. Letters of administration with the will annexed were subsequently issued to the defendant Sullivan. The plaintiff had resided with the testator in France, and subsequently to his death, in 1875, she presented two claims against his estate, amounting to over \$20,000. Such claims were, by consent, by an order of the Special Term made in February, 1879, referred to a referee. The case was brought to trial before the referee, and in June, 1879, he made his report in which he found that on or about the 1st day of January, 1867, the testator borrowed from the plaintiff \$12,500, which he agreed to repay on demand with interest at the rate of seven per cent., and that on the 20th of October, 1868, in consideration of \$9,000 paid to him by plaintiff, he assigned to her a mortgage upon real estate; that the assignment was not put upon record, and that subsequently the testator acknowledged satisfaction of the mortgage and that thereby the mortgage was satisfied of record; and the referee found and decided that after the death of the testator the plaintiff took possession of all the testator's estate in France, consisting of papers, chattels, real estate and fixtures, and accepted the condi-

tions of the testator's will, and took his property in France subject to such conditions and in lieu of all claims against his estate; and he ordered judgment in favor of defendant.

We are of opinion that the case was properly disposed of. The testator in his will provided as follows: "I appoint Miss Hannah Maria Caulfield, living with me, to be my universal legatee, consequently I leave to her the whole of the real and personal property which shall belong to me on the day of my decease, and which shall compose my succession, on condition that she execute the disposition hereinafter contained, and any others which I may make hereafter. I bequeath to my two brothers, *first*, Mr. Robert Yelverton of New York, *second*, and Mr. Charles Yelverton of San Francisco, to be divided between them in moieties, all the real and personal estate which shall belong to me, in America, on the day of my decease without exception." In the codicil, after referring particularly to the will, it is stated as follows: "Whereas, by my said will, I have devised and bequeathed all my property, situated on the continent of America, to my brothers Robert and Charles equally, now it is my will and I do hereby confirm the said devise and bequest, and in order to facilitate the realization of my property, situated on the continent of America, I do hereby appoint my said brother Robert executor as to such property, and except as aforesaid I do hereby expressly ratify and confirm my said last will and testament."

The testator left real and personal property, both in France and the United States. After the death of the testator, Miss Caulfield took possession of the property left by the testator, in France, and soon thereafter she declared to Mrs. Yelverton, the wife of Robert Yelverton, who was sworn as a witness before the referee, that "she accepted the conditions of the will of Henry Yelverton, and that she took his property in France in lieu of all claims against his estate." It does not appear how much property the testator left in France, or what became of it, except as above stated.

Under such circumstances, the provision made for her in the will, and her acceptance thereof, must be deemed a satisfaction of her claim against the estate. It is manifest that it

was the intention of the testator that his brothers should receive all his American property, for the exact language of the will is, that they should receive it "without exception;" and it is upon the condition that they should so receive it, and that she would execute that portion of the will, that she was made the universal legatee of all his other property. It was in the contemplation of the testator that she would either surrender her claims against the estate or obtain satisfaction of them out of his property in France, and it would defeat his manifest intention if the property given to his brothers was to be diminished by the amount of her claims, for then they would not receive it "without exception." It is clearly inferable that the testator, leaving considerable property in France, did not intend that she should cross the Atlantic and enforce her claims against the property given to his brothers; and this inference is somewhat strengthened by the fact that in his codicil he appointed his brother Robert executor as to his American property, leaving her as universal legatee to execute his will as to the property in France. She could not enforce her claims against the American property, and at the same time, see to it that that portion of the will which gave such property to his brothers was executed.

This, therefore, was a case where she was bound to elect whether she would retain her claims and enforce them against the testator's property, or abandon them and take the property given to her. She could not take a benefit under this will and refuse the burden it imposed upon her. The effect of the will is the same as if the testator had given his American property to his brothers and then given the other property to her, on condition that she would release her claims against the estate. By accepting the provision made for her, she assented to all the terms and conditions annexed to it, and yielded every right inconsistent with such terms and conditions. One who accepts of a devise or bequest does so on condition of conforming to the will. No one is allowed to disappoint a will under which he takes a benefit, and every one claiming under a will is bound to give full effect to the legal dispositions thereof so far as he can (*Chamberlain v. Chamberlain*, 43 N. Y. 424-442), and

where one is thus put to his election under a will it matters not that what he takes turns out to be greater or less in value than that which he surrenders. (*Brown v. Knapp*, 79 N. Y. 136-143.)

As the testator was a citizen of this country, claiming his domicile here, but temporarily residing in France, his will must, in our courts, be construed according to our laws, and hence the rules of construction above referred to are applicable. If Miss Caulfield had made her election under such circumstances that she could have revoked it, it does not appear that she ever did revoke it, or that she ever surrendered, or offered to surrender, any of the property which she took in France. The testator died, and her election was made in 1873; her claim against the estate was formally made in 1875; and her case was tried in 1879; and there is nothing showing that she did not have the full benefit of the property of which she took possession in France. There was, therefore, no error in holding that she was bound by her election.

It is claimed, however, that the will was not sufficiently proved. Upon the trial before the referee the defendant produced the records of the surrogate's office in New York, which showed that the will was admitted to probate as to personal estate only upon the production to the surrogate of a duly authenticated copy from under the seal of the court in which the same was proved; and that the codicil was proved by the evidence of witnesses taken upon commission; and the record contained a copy of the will in French, the language in which the will was originally written, and an English translation thereof, and a copy of the codicil, which was originally written in English, together with the evidence given to prove the execution of the codicil.

It is not disputed that the execution of the codicil was sufficiently proved. The claim is that the will was not sufficiently proved and that the surrogate did not acquire jurisdiction to prove it. There are two answers to this claim: *First*. The testator was a citizen of this country having a domicile at the time of his death in the city of New York, and he left property there. The surrogate, therefore, had jurisdiction to take proof

of his will, and to admit it to probate, no matter where it was made, or where he died. If he admitted it to probate without sufficient proof, or without the proof or the formalities which the law requires, it was a mere error in the exercise of his jurisdiction and not judicial action without jurisdiction, and such error could be corrected only by application to the Surrogate's Court or appeal from its decree.

It is provided in section 1 of the act Chapter 359 of the Laws of 1870, that "the surrogate of the county of New York shall have power and jurisdiction to issue all lawful process, upon allegations duly verified, and to make and enter all lawful orders and decrees in proceedings in the Surrogate's Court of said county, and the objection of want of jurisdiction shall not be taken to said orders and decrees except by appeal in the manner prescribed by statute, or in a proceeding before the surrogate to set aside, open or modify the same, and the surrogate shall have the same power to set aside, open, vacate or modify the orders or decrees of the said court as is exercised by courts of record of general jurisdiction." This law is a sufficient answer to this collateral attack upon the probate of the will, without reference to decisions leading to the same result to which our attention has been called. (*Bearns v. Gould*, 77 N. Y. 455.)

Second. The codicil distinctly referred to and identified the will and re-affirmed the same, and hence the will and the codicil together constituted the will of the testator; the provisions of the former may be treated as embodied in the latter, and both may be treated as if executed and published at the same time. (*Brown v. Clark*, 77 N. Y. 369.)

Objection was made that the English copy of the will contained in the record was no part of the probate. We think it was. It appears in 2 Redfield on Wills (2d ed.), p. 45, that "it is requisite, where the will is in a foreign language, that the probate should contain a translation of the same into English," and such plainly must be the law. Suppose a will be executed in Latin, Greek or Arabic, with the formalities required by our statute, what is to be done with it when it is presented for probate? Its execution must be proved in English. The precise

language in which the will is written is of little significance; whether it be in our language or another is of no importance. The will of the testator is to be ascertained from the meaning which he has expressed, in whatever language; and that meaning, put into proper English, must, in a court required to use the English language, be taken as the testator's will and placed upon record. There can be no necessity for recording it in the foreign language; and yet the practice of recording in both languages, where that can be done, is quite proper. It was the duty of the surrogate, in this case, to ascertain what the will of the testator, written in a foreign tongue, was; and the translation which he has recorded must be treated as part of his decree, unassailable collaterally, like the rest of it.

Our attention has been called by the learned counsel for the appellant to the case of *L'Fitt v. L'Batt* (1 P. Wms. 527). In that case there was a French will, the original whereof was proved in French, and under it, in the same probate, the will was translated into English, but it appeared to be falsely translated. It was objected that the translation, being part of the probate, and allowed in the spiritual court, must bind, and that the application must be to the spiritual court to correct the mistakes in the translation, which, until then, must be conclusive. The master of the rolls said that "nothing but the original is part of the probate, neither hath the spiritual court power to make any translation; and supposing the original will was in *Latin* (as was formerly very usual), and there should happen to be a plain mistake in the translation of the *Latin* into English, surely the court might determine according to what the translation ought to be, and so it was done in this case." That case is meagerly reported, and it does not appear by what rules or usages the spiritual courts were governed in admitting to probate wills written in a foreign tongue; but so far as that case holds that a will written in a foreign language must be admitted to probate and recorded in the foreign language only, it is without reason, certainly as applied to the state of things existing in this country. But the authority of that case would seem to authorize any court before which the question was raised to determine whether the translation was correct

or not. We have examined this translation, and have no reason to doubt that it is correct; and that it was correct was not even disputed on the trial before the referee.

We have, therefore, reached the conclusion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Estoppel by accepting benefit under Will.—One who accepts a devise of a legacy, does so under the implied condition that he will not seek to enforce any claim contrary to the provisions of the will under which he takes, and that he will, as far as he is able, endeavor to have the will given its full legal effect. *Weeks v. Weeks*, 77 N. C. 421; *Stuart v. Easley*, 5 J. J. Marsh. 214 (per Robertson, J.); *Cox v. Rogers*, 77 Penn. St. 160; *Penn. Life Ins. Co. v. Stokes*, 61 Penn. St. 136; s. c. 2 Brewst. 590; *Little v. Birdwell*, 27 Texas, 691; 2 Story's Eq. 1075.

Acceptance of a bequest is a confirmation of the dispositions made by the will. *Noe v. Splivalo*, 54 Cal. 207; s. c. 1 Am. Prob. R. 498; *Weeks v. Patten*, 18 Me. 42; *Smith v. Gould*, 84 Me. 448; *Lessley v. Lessley*, 44 Illinois, 527; *Young v. Pickens*, 49 Indiana, 28.

But acceptance of a legacy is not necessarily an estoppel to claiming that the will was invalid. *Hindert v. Schneider*, 4 Bradf. 203.

A devisee, by bringing his action against the executor of the will, relinquishes the benefit of the devise to himself, but does not forfeit his claim to an independent devise to his wife in the same will. *Hapgood v. Houghton*, 22 Pick. 480.

A legatee who has accepted and entered upon the enjoyment of his legacy, cannot afterwards demand that the terms and conditions of the legacy shall be changed. *Succession of McCloskey*, 29 La. Ann. 406.

Neither can one who has accepted and received his legacy, refuse to comply with the conditions under which he took, on the ground that the estate turned out not so valuable as he had supposed it would. *Frost v. Lawler*, 34 Mich. 285.

One accepting a legacy under a will, cannot assert an independent title in other property against the will. But if, having received his legacy in ignorance of this rule of law, upon being informed of it, and before any other person's rights have been affected, he returns the legacy, and gives notice that he elects not to take it, the rule does not apply. *Watson v. Watson*, 128 Mass. 152; s. c. 1 Am. Prob. R. 471.

In California, a widow, having filed her renunciation, according to the provisions of the statute, under a clause in her husband's will, viz.: "The foregoing bequests to my wife are made upon the condition that she shall renounce all claim against my estate except under this will," was held not to waive her rights as survivor of community property, and she was held enti-

bled to one-half of the estate as survivor of the community, to the legacies given her in the will, and to her statutory share of the legacies left to children who died before the testator. *Mumford's Estate*, *Myrick's Probate* (Cal.), 133.

And in the same State, a widow, who accepts under a will which attempts to dispose of more than one-half of the community property—which is prohibited by statute—is not deemed to have renounced her rights in the common property. *Re Frey's Estate*, 52 Cal. 658.

The heir at law of a testator, claiming a legacy under a will, and also claiming real estate as heir at law against the will, the will being inoperative as to real estate by reason of a defective execution, is not put to his election, but will take both the legacy and the land. *Kearney v. Macomb*, 16 N. J. Eq. 189.

It is entirely reasonable for a testator to say, when he makes a gift to one, that it is in bar of a claim the donee has, or may, set up against him; and, in North Carolina, the legatee must release the claim before he can have his legacy. *Dunlap v. Ingram*, 4 Jones' (N. C.) Eq. 178.

The devisees and legatees of a will may bind themselves to destroy it, either by parol or in writing, and a party to such an agreement is estopped from claiming under the will. *Phillips v. Phillips*, 8 Watts (Pa.), 195.

MORSE vs. STEARNS.

[131 Massachusetts, 389.]

EXTRINSIC EVIDENCE WHERE AMBIGUITY AS TO LEGATEE.—BILL OF INTERPLEADER TO DETERMINE SAME.

If a legatee is not described in a will with exact accuracy, and the description may in some respects be applicable to different persons, each of whom claims the legacy, the executor may maintain a bill of interpleader for the determination of the person to whom the legacy is payable.

Extrinsic evidence of the conduct and the declarations of a testator is admissible to show his relation to, and state of feeling towards, any of the respective claimants of a legacy, where the legatee is not described with entire accuracy, and the description is in some respects applicable to each of the claimants.

A woman who had two nephews, one named Joseph White Sprague, and the other Joseph Sprague Stearns, by her will bequeathed a legacy "to my nephew J. S. Sprague." *Held*, that the inference was that she intended Joseph White

Sprague; and that, in the absence of extrinsic evidence sufficient to control this inference, he was entitled to the legacy.

D. E. Ware, for J. W. Sprague.

C. Robinson, Jr., for J. S. Stearns.

LORD, J. The testatrix had two nephews, one named Joseph White Sprague, and the other, Joseph Sprague Stearns; and each claims the legacy which is given in these words: "To my nephew J. S. Sprague, I give five thousand dollars."

This is a bill in equity brought by the administrator with the will annexed, to which all the legatees under the will are made parties, in order that all the others beside the two nephews may appear and show that the said bequest is void for ambiguity; because it is apprehended that the estate of the testatrix, being largely real estate, has so depreciated in value that not sufficient remains to pay all the specific legacies in the will; and the residuary legatees are made parties for the purpose of sustaining their right to have this legacy go into the residuum of the estate.

The bill was taken *pro confesso* as against all the parties except the two nephews, and they were required to interplead between themselves, each to show his right to the legacy.

There is no doubt that it is a proper subject for a bill of interpleader. From the earliest time, matters of this kind have been the subject of judicial determination, and many rules have been established for determining to whom a legacy shall be paid, when the legatee is not described with exact accuracy, and the description of whom may in some respects be applicable to several different persons, each of whom claims the legacy.

Extrinsic evidence of the conduct and the declarations of the testator is competent. They are not to be deemed direct proof of testamentary intention, but as showing the testator's relation to, and state of feeling towards, any of the respective claimants. The language of the will is to be interpreted with reference to the subject-matter and all the surrounding facts of the case. A construction is not to be given which is contradictory to the terms of the will. By this it is not meant that

the construction of the language of the will must be exactly consistent with every word used in the will, but that the purpose and intention of the testator must be gathered from the language of the will taken in connection with all the surrounding and attendant circumstances.

Various other rules have been established to which it is not necessary to refer, for they are rules made necessary by the peculiar facts of the various cases, many of which have been decided upon the particular and special facts of the case. Sometimes it happens that a will is made when the testator is *in extremis*, when his voice is feeble and low, and his enunciation indistinct. Sometimes a beneficiary is spoken of by the testator by an abbreviated or by a pet name. The reported cases show many instances of these and other kinds of difficulties and obscurities; but no facts in this case make it necessary or even proper to refer to all the cases which have occurred, nor to the rules which it has been found necessary to establish in determining them. It is sufficient for us to say, that the bequest is to "J. S. Sprague," with the use of initials only to indicate the Christian name of the legatee; that that designation is more nearly applicable to Joseph White Sprague than to Joseph Sprague Stearns, inasmuch as the surname corresponds, and the variance is only in the initial letter of the middle name. It cannot be doubted that the bequest was intended for one of these nephews; and, taking all the extrinsic evidence of relation to the parties and circumstances into consideration, there is not sufficient to control the inference in favor of the nephew Sprague.

The difficulty having been created by act of the testatrix, the costs of all parties, taxed as between solicitor and client, should come out of the general estate. *Charter v. Charter*, L. R. 7 H. L. 364; *Deane v. Home for Aged Colored Women*, 111 Mass. 132.

Decree accordingly.

See *Judy v. Gilbert*, *ante*, page 39; *Griscom v. Evens*, 1 Am. Prob. R. 130; *Burnett v. Id.*, Id. 539.

CUTHBERTSON'S APPEAL.

[97 Penn. St. 163.]

DEVISE TO CONFIDENTIAL ADVISER.—BURDEN OF PROOF TO SUSTAIN.

Where the testator is shown to be weak in mind, though not sufficiently so to create testamentary incapacity, and a person whose advice had been sought and taken, receives a large benefit under the alleged will, such person must show affirmatively all the circumstances connected with the drawing of such will, and that the testator had a full understanding of the nature of the disposition contained in it.

APPEAL by James Cuthbertson, James Georgeson, and Agnes, his wife, Jeanie Cuthbertson, the contributors to the Pennsylvania Hospital and the Zoological Society, from a decree of the Orphans' Court of Philadelphia, refusing an issue *devisavit vel non*, to determine the validity of an alleged codicil to the will of John L. Neill, and dismissing an appeal from the decision of the Register of Wills, admitting such codicil to probate.

The testator, John L. Neill, was born in Scotland about 1806, came to this country in 1828, and entered business, from which he retired in 1867, with a considerable fortune.

In 1876 he had survived his children, brothers and sisters, and was living, with his wife, her sister Miss Lambert, a Miss Maloney her cousin, and one William Cuthbertson, to whose family he was under obligations.

In 1874, Neill himself wrote out and signed his will, giving his wife the use of his residence for life and \$8,000 a year, and to Miss Lambert \$2,000 a year, and to Miss Maloney \$1,000 per annum, payable out of securities in which his property was to be invested. He also directed:

"Item 14th. On the death of my wife and her sister, Elizabeth A. Lambert, I desire that the sum that was set apart to produce the yearly income for the maintenance of my wife, her sister Elizabeth A. Lambert, and her cousin Mary Ann Maloney, be now merged with my other estate, and the whole dis-

posed of by my executors, at sale or otherwise, that the several legacies that commenced with item No. 20 may be paid, and the estate settled up in the shortest possible time. I desire to draw the attention of my executors to the difference in value in property at present and what it may be in the future on the decease of Elizabeth A. Lambert, and as the several legacies numbering from twenty up to thirty-nine will only be paid after her decease, the aggregate being more or less, the items or sums will be proportioned accordingly."

"Item 20th. I give and bequeath to each of the children of my friend, Mrs. James Cuthbertson, of Leith, Scotland, to Agnes, now Mrs. Georgeson, twenty-five thousand dollars (\$25,000).

"Item 21st. To William, eldest son of Mrs. Cuthbertson, twenty-five thousand dollars (\$25,000).

"Item 22d. To James, second son of Mrs. Cuthbertson, twenty-five thousand dollars (\$25,000).

"Item 23d. To Jeanie, youngest daughter of Mrs. Cuthbertson, twenty-five thousand dollars (\$25,000).

"Item 26th. To three executors of my estate ten thousand dollars (\$10,000) each (\$30,000).

"Item 27th. To Louisa Harrison, of Philadelphia, five thousand dollars (\$5,000).

"Item 28th. To Mrs. N. P. Murphy, of Philadelphia, five thousand dollars (\$5,000).

"Item 29th. To Mrs. Louisa Lambert, of Philadelphia, three thousand dollars (\$3,000).

"Item 30th. To Pennsylvania Hospital, Philadelphia, five thousand dollars (\$5,000).

"Item 34th. To Old Man's Home, Philadelphia, five thousand dollars (\$5,000).

"Item 35th. To Zoological Garden Park, Philadelphia, ten thousand dollars (\$10,000)."

The aggregate of the legacies in the will was \$173,000.

He appointed John S. Yardley, Henry E. Busch and Horace Yardley, executors.

In November, 1876, the testator's wife became very sick, and he had, at short intervals, two strokes of paralysis. About the time of the last stroke his wife died.

William Cuthbertson testified that after these occurrences the testator's power of speech was affected, he was unable to write without assistance, and his memory was much impaired. There was medical expert testimony to show that the testator's paralysis might produce these results.

Doctor Drysdale, who attended testator in his last illness, testified to his clearness of mind, soundness of memory, and freedom of speech.

Miss Lambert testified that on December 1st, 1876, testator requested her to send for Mr. John S. Yardley, a personal friend and a conveyancer, who had frequently been employed by him.

Yardley read over the will, commented on the largeness of the bequests, and suggested their diminution. He also said, "Well, Mr. Neill, there will be a residue, and will that go to the heirs and assigns," and the testator replied "Yes."

That night Yardley prepared a draft codicil reducing the amount of legacies to \$35,000, and fixing the Cuthbertsons' and Agnes Georgeson's at \$2,500 each, Louisa Harrison's, Mrs. Murphy's, Mrs. Lambert's, and the Pennsylvania Hospital at \$1,000 each, and the Zoological Society's at \$2,500. The residue of the estate, some \$300,000 in value, was devised to Yardley.

Miss Lambert testified that, on the morning of December 2d, Yardley called, and read the draft codicil to the testator, who did not say anything; that Yardley named the subscribing witness, and said he would call in the evening again, which he did, when the will was executed and put away by her till the next day, when, at his request, she read it to the testator, but he made no remarks. The testator signed the codicil with a cross.

Yardley contradicted this evidence, stating in substance that the testator himself suggested the reduction in the legacies; that when asked as to the disposition of the residue, he replied he gave it to him, Yardley, for his "many valuable services;" that the testator named the witnesses, and requested him to come in the evening; that in the evening, in the presence of one witness, a Mr. McPherson, and Miss Lambert, he

carefully read over the document to the testator, who, to an inquiry whether it was all right, replied in the affirmative.

McPherson corroborated this testimony as to what took place in his presence, and both Doctor Drysdale and he testified that the testator verbally expressed his assent to the codicil when affixing his mark to it.

Soon afterwards Neill became affected with aphasia, a disease produced by the paralysis resulting in a weakening of his mind and loss of speech. There was contradictory testimony as to when this set in, some fixing its advent in December, 1876, others as late as February, 1877. In September, 1877, Neill died.

The Register of Wills, on the application of the executors, admitted the will and codicil to probate, and issued letters testamentary thereon.

Henry J. McCarthy and *William A. Porter*, for James and Jeanie Cuthbertson and Agnes Georgeson, appellants.

A. Sydney Biddle and *George W. Biddle*, for the contributors to the Pennsylvania Hospital, appellants.

W. W. Montgomery and *Samuel Wagner*, for the Zoological Society, appellant.

Robert N. Willson, for the appellees.

SHARSWOOD, C. J. *Boyd v. Boyd*, 16 P. F. Smith, 283, established a general principle of the highest importance for the protection of persons who call in professional or other advisers to assist them in making their last wills. That principle may be briefly stated thus: Where the alleged testator is shown by evidence to be weak in mind, whether arising from age, bodily infirmity, great sorrow, or other cause tending to produce such weakness, though not sufficient to create testamentary incapacity, and the person whose advice has been sought and taken receives a large benefit under the instrument propounded as a will, it must be shown affirmatively that the alleged testator had full under-

standing of the nature of the disposition contained in it. The general rule undoubtedly is that testamentary capacity and knowledge of the disposition made are presumed. Where the testamentary capacity is perfect, fraud or undue influence must be shown. In such case the undue influence must be such as to destroy the freedom of will of the party, or at least very much to impair it. But not so in the case of an old, infirm, and mentally weak man, disposing of his estate in favor of his confidential adviser. These principles were all affirmed and recognized in *Frew v. Clarke*, 30 P. F. Smith, 170. That case did not in the least shake the principle of *Boyd v. Boyd*, which was fully supported by the authorities, and is founded on sound principle and the wisest policy. Wills are generally prepared according to instructions given to the scrivener privately, when no one else is present; and to hold that in the case supposed it is sufficient to prove the formal execution of the paper in the presence of witnesses, and then throw upon the contestants the burden of proving fraud, undue influence, misrepresentation or mistake, would open the door wide for the arts of the cunning and designing to succeed in their nefarious purposes. Every man who draws a will in his own favor, under such circumstances, should know that he will be required to prove affirmatively all the circumstances connected with the drawing of the will, and that it must appear that the alleged testator was laboring under no mistaken apprehension as to the value of his property and the amount he was giving to his confidential adviser. It has been decided that the beneficiary himself is a competent witness to prove the will. He cannot complain, then, that the rule is hard or unjust which requires him to make it clearly appear that the gift to him was the free, intelligent act of the testator. In truth, we were not called on in *Frew v. Clarke* to re-examine the decision in *Boyd v. Boyd*. In the latter case it was held merely that upon the evidence there given the judge below was right in submitting the case to the jury. In *Frew v. Clarke*, upon the trial of the issue of *devisavit vel non* below, the question had been submitted to the jury, and the verdict sustained the instrument propounded as a will. Mr. Justice Mercur says, in the opinion of the court

delivered by him: "If the mental capacity of McCully (the testator) had been impaired, if he had become weak from age or bodily infirmity, although not to such an extent as to destroy his testamentary capacity, it might have shifted the burden of proof, and required the defendant in error (the legatee) to negative by evidence a presumption of undue influence. It is shown, however, that McCully's mental capacity was not impaired." Of course, upon the principle of *Boyd v. Boyd*, the judgment of the court below had to be affirmed. There were other questions in the case. Whether the paper propounded was a will or an obligation sealed and delivered *inter partes*, and whether, conceding it to be testamentary, Clarke, the legatee, was a competent witness to prove it. Upon these questions the court was divided, but not upon the general principle settled in *Boyd v. Boyd*.

We consider that the case presented on these appeals is entirely within that principle. Had the only question been on the testamentary capacity of John L. Neill, there would be reason to hold that there was not sufficient evidence to justify a jury in setting aside the codicil. Had it been drawn without advice and suggestion by Neill himself, as was the original will, it must have stood. But it cannot be disputed that there was evidence, we think enough to carry the case to a jury, that the testator was not the same man physically and intellectually when he executed the codicil as when he made the original will. A jury might reasonably so conclude from the evidence. Then the onus was thrown on Yardley to prove that Neill fully understood the value of his property and the probable residue after paying all his legacies. It would not be proper for us to express any opinion upon the weight of the evidence as bearing upon this question. Upon the issue to be granted, it must be submitted to a jury under proper instructions from the court.

There may be a case where the alleged undue influence is applicable only to a single independent provision in a will, and that provision may fail, leaving the rest of the will to stand. It is certainly not this case, where the clause objected to is a residue, and that residue made up or largely increased by alter-

ations made, as a jury may conclude, under the same influence for that purpose. It may be, however, that if the bequest of the residue in the codicil fail and the rest stands, the general direction of the will in the fourteenth item will apply to the legacies in the codicil as taking the place merely of the legacies from item 20 up to item 39 in the original will. Upon this point we express no opinion. In either case the appellants have an interest to contest the codicil.

Decree reversed. And it is ordered and decreed that the issue prayed for in the court below be granted, and the record remitted for further proceedings.

See Drake's Appeal, 1 Am. Prob. R. 227.

CHEEVER *et al.* vs. CIRCUIT JUDGE OF WASHTENAW COUNTY.

[48 Michigan, 6.]

**RIGHT OF EXECUTORS TO APPEAL FROM REFUSAL OF PROBATE IN
OPPOSITION TO WISHES OF HEIRS.**

Executors under a will which gives them exclusive powers and trusts, and provides for unborn heirs, may appeal from its disallowance though all the beneficiaries named in it, and all who would have been interested if the decedent had died intestate, should settle the estate among themselves and oppose the appeal.

A will which provides that "after the death of testator's daughter, he gives her children and grandchildren," etc., contemplates descendants then unborn who shall be in being at the time of the daughter's death.

MANDAMUS. The facts appear in the opinion.

Sawyer & Knowlton, for relators.

E. D. Kinne and *B. F. Granger*, for opposed.

COOLEY, J. The sole question in this case is, whether the persons named executors in an instrument purporting to be the last will and testament of Hiram Arnold, deceased, may appeal from the order of the Probate Court disallowing the same, notwithstanding all persons who would be interested as heirs or distributees in case the decedent had died intestate, and all living persons whom the instrument purports to make beneficiaries, unite in a settlement of the estate and oppose the appeal. The circuit court held that they could not, and dismissed the appeal which, in due form, they had attempted to take.

The circuit judge was quite right in saying that litigation over estates is a great and growing evil, and that parties should be encouraged to avoid it by voluntary arrangements, instead of being prevented. But it becomes important in any case to make sure that all persons who are or may be interested join in the settlement, and also, in the case of wills, that no declared policy of the testator in putting his property or any portion of it beyond the control of those concerned in the settlement, is defeated thereby.

A reference to the will, a copy of which is given in the margin (see note), will make it clear that purposes are expressed therein which were to be accomplished irrespective of the desires of the heirs, distributees or beneficiaries. One of these was the erection of a monument to the decedent; and it is a noticeable fact which may assist in the explanation of some other provisions of the will, that the executors, and not the family, were to decide upon this, and to determine upon the inscriptions and the headstones. In respect to this monument the executors alone can represent the testator's will, and no settlement can deprive them of their discretionary authority. The decedent trusted to them, and to no others.

But it is equally manifest that the decedent had beneficiaries in view who could not possibly be represented in any settlement. The gift to Escalala N. Green is of a life estate only, and on her decease her share is to pass to her children and grandchildren, share and share alike. We do not understand that she then had any grandchildren, and the will must have

intended the children and grandchildren who should be in being at the death of Mrs. Green. The gift to Eugene B. Arnold is also for life only, and after his death his heirs become the beneficiaries. We do not know why these gifts to the daughter and son were thus restricted, but it is plain that the decedent intended that the descendants of his children should succeed to the property beyond a peradventure, and that it should not be in the power of the children themselves to prevent it. We need not inquire into the reasons; being sufficient to the decedent they are for legal purposes sufficient to all others.

To guard against his purposes being defeated the persons named as executors were made trustees with very extensive powers. They were given full discretion to sell real and personal estate without taking the advice of the Probate Court; they were to keep all funds invested, and upon them he relied to save the contingent interests for those who were in mind as future beneficiaries. When the living children and grandchildren undertake by agreement between themselves to appropriate the whole property, they attempt to make a new will for the testator; to take to themselves the fee when he gave life estates only; to relieve themselves from trusts which he deemed essential; to cut off after-born children who were plainly the special objects of his bounty. But it is plain that this cannot be done without an equal disregard of the will and of the law. The trustees are the representatives of the dead donor in his wishes, and they represent also the future beneficiaries, who, being as yet unknown, can have no other representatives or protectors.

The will was assailed on the ground of mental incompetency. Had the issue been fully and fairly tried in the Probate Court and decided on the merits, and had the appeal been taken on technical grounds, we should agree that the relators ought not to press it. It would be inexcusable in them to make costs for the estate which they at the outset must know would be incurred in a vain attempt to support a nullity. But there is every reason to believe from this record that the case has not been fully heard, and that the decision went as it did

because of the compromise. Under such circumstances the executors have an undoubted right to appeal, for they have substantial interests to protect. Whether they might appeal for the mere purpose of protecting the decedent's reputation, if they believed his competency unjustly assailed, we need not discuss, for in this case such a question does not and cannot arise.

It is urged that the *mandamus* which is applied for is not a proper remedy. But the purpose is merely to set the court in motion that the appeal may be heard (*Comstock v. Wayne Circuit Judge*, 30 Mich. 98); and it must issue as prayed.

The other Justices concurred.

The testator named two executors in this will, giving them "full power to sell and convey the real estate and personal property belonging to my estate, without asking or obtaining license from any court for that purpose."

The third clause read: "I hereby direct my said executors to erect on my lot in the cemetery at Ann Arbor, a family monument of Scotch granite, with suitable inscriptions thereon, and also such headstones as they may deem appropriate; such family monument not to cost less than one thousand dollars."

Several specific legacies of one and two thousand dollars each were made.

The material portion of the seventh clause read: "After the payment of my debts, the expenses of the settlement and administration of my estate and the above legacies, I give, devise and bequeath to my daughter Escalala N. Green, the use, interest and income of my entire estate, both real and personal, during her life, except as hereinafter provided. When my granddaughter Luella Beaman shall become of the age of thirty-five years, then I give, devise and bequeath to her and her heirs and assigns forever, one-fourth of my estate, both real and personal. And when my grandson, Clay Green, shall become of the age of thirty years, then I give, devise and bequeath to him and his heirs and assigns forever, one-fourth of my estate, both real and personal. And after the death of my said daughter, Escalala N. Green, I give, devise and bequeath to her children and grandchildren, all my estate, both real and personal, the use of which is above bequeathed to her; the same to be divided equally among them, share and share alike."

The ninth clause read: "I hereby will and direct that my said executors and their successors, shall keep all my estate except said homestead farm (specifically devised) invested in good real estate mortgages, or other safe and reliable interest-bearing securities, and pay the interest and income from the same to my legatees as above provided, at least once in each year, if possible, after deducting their reasonable charges and expenses in managing said estate, until said estate shall become absolutely vested in said legatees by the terms of this will."

GOTT vs. CULP.

[45 Michigan, 265.]

DUTY OF GUARDIAN IN MAINTAINING WARD.—USE OF PRINCIPAL.
—INVESTMENTS.

A guardian's discretion in respect to the boarding and schooling of a ward stands on a similar footing with a parent's.

His discretion in expenditures for the clothing of a female ward cannot usually be reviewed if they are not out of proportion to her social position and are made in good faith and are not in excess of her means.

A guardian should not exceed his ward's income without adequate reason. While it is prudent to obtain leave in advance to use the principal, it is not necessary; if circumstances justify it the use ought to be made.

A guardian should not be held for interest upon his ward's moneys not actually received, unless his delay to invest has been unreasonable.

APPEAL from allowance of guardian's account in the Probate Court. The guardian brings error.

Albert Crane, Frazer & Hamilton and Edward F. Conely,
for plaintiff in error.

Charles S. May, for defendant in error.

CAMPBELL, J. Plaintiff in error was appointed by the Probate Court for the county of Washtenaw, in 1861, as guardian of defendant in error, then about six years old, her name being then Goodrich. In 1876 she married. Mr. Gott at the end of his trust filed his account, which was allowed as presented, no contest being made in the Probate Court over its correctness. The ward, however, appealed to the circuit court for the county of Washtenaw, setting up four grounds of complaint, which were in substance that the guardian had failed to keep money invested, had charged for excessive expenditures and made over-claims for compensation, and had in general disregarded his duty and thereby lost his right to compensation.

No issues were framed in the circuit court, but the appellant demanded a jury. The cause was in advance of any trial submitted to an auditor, Thomas Ninde, who formulated the

account and reported it in accordance with the claim of the guardian. On the trial several questions were presented, all supposed to bear upon the grounds of appeal. By stipulation, the auditor's report was made conclusive as to moneys received and expended, leaving the questions open as to the reasonableness and correctness of the payments and charges.

The finding of the jury charged the guardian with nearly twice as much interest as he was shown by this report to have received, the difference being probably intended to include interest which might have been earned by more careful investments. The outlays for the ward and for trust purposes were allowed substantially as charged. His claim for compensation was left out almost entirely. The finding does not show the reasons for any of these results, and is silent concerning facts.

As far as we can determine from a comparison of the report, which is part of the record, and the finding, in the light of the bill of exceptions, we infer that while all of the guardian's money expenditures were approved, he was regarded by the jury as having lost all claim to compensation by reason of fault, and as having subjected himself to a charge for interest because he did not invest promptly, and at the best rates.

The exceptions taken on the trial all bear upon the matters involved in these results, and may mostly be included under a few heads. They present the inquiry whether there was culpability in not accounting—whether the guardian could rightly expend more than the ward's income—whether he was not extravagant in allowing or making expenditures—whether he was culpable in the training of the ward—whether he was culpable in not making larger and more lucrative investments—whether he was entitled to furnish goods himself, or to charge for legal services, and whether neglect in any of the duties of his trust deprived him of a right to compensation. As these are all mixed up with each other in the record, and seem to have gone to the jury together, we shall not take up the exceptions separately when they can be dealt with together. The conclusions at which we have arrived concerning the proper form of the litigation will make some questions unimportant.

Before going into the specific subjects we may properly refer to some points made on the language used by the court during the trial. There is some reason to think that the course taken on the trial created a degree of impatience in the trial judge, which led him to rather sharp comments on facts and testimony, some of which we think had a necessary tendency to prejudice the jury. It is impossible for an appellate court to appreciate all the surroundings of a trial, and we are bound to believe that the trial judge would not intentionally make any remark provoked or unprovoked by the methods of the trial, or by his view of the testimony, which would deprive a party of his rights. We think, however, that remarks were made which could not fail to favor the notion that the guardian was culpably lax in his duties, and that relatives and others had supported the ward by reason of his neglect. This, on any state of testimony, was going too far. It was also error to intimate that proceedings in this case could properly be made to deter other guardians from doing as this guardian did. Every case must stand on its own merits. The effect of these suggestions was manifest from the verdict, which upon some points is not supported at all by proofs.

To appreciate the other questions a brief statement will be required.

The ward, when the guardian was appointed, was of tender years, and not enjoying any parent's care. The guardian made arrangements to have her cared for in the family of an uncle and subsequently in that of an aunt. The estate which she was then presumably to enjoy was not productive or determined. It was about nine years before any considerable sum came from it into the guardian's hands. In 1871 he received from it \$1,640, which with a few scattering payments made earlier barely repaid the previous outlays for her board, clothing and other necessities. After this the guardian received in 1873 from the same estate between four and five thousand dollars, and this was all the funds which at the time of his appointment, and for many years after, he had any right to expect would be received. The child, however, belonged by all her associations to intelligent and reputable people living in a comfortable way, and was entitled if possible to corresponding nur-

ture. In 1873, by reason of the death of a relative in New York, an additional fund was received of about \$9,000. The death occurred a little earlier, and there were necessary delays in procuring the money, though no litigation. In 1873 the entire funds from all sources were realized.

For his services in going to New York and obtaining the possession of the fund there, the guardian, in addition to his outlays, charged \$500 as extra compensation for his services as a lawyer in connection with his ordinary services as a guardian.

Up to 1871 he charged \$25 a year for his services. After that year he claimed \$300 a year.

When the ward became of proper age—about 15 or 16 years—he purchased a piano for her. During a portion of her minority he was in mercantile business, and furnished goods, himself, instead of buying them. He also sent her to a boarding school in Canada. There was testimony introduced for the purpose of showing that he could have got board cheaper, and that she received more clothing and other supplies than some of the witnesses deemed necessary, and was not careful of them, and gave more or less away.

So far as her boarding and schooling expenses are concerned, we do not think there was anything which ought to have gone to the jury to impugn them. The law is entirely well settled that the guardian's discretion in such matters stands on a very similar footing with a parent's, and that he is not compellable to prefer mere economy of cost to the welfare and comfort of his ward. He was justified in taking considerable pains to secure the care and oversight of a near relative, and in paying heed to her representations if he really regarded them as trustworthy. There is nothing tending to show any want of good faith in this matter, and the jury should not have been allowed to treat it as if there had been. The choice of a school stands on a very similar footing. He was also quite right in doing what he could to prevent the danger of such alienation of feeling as might impel the ward to resort to deceit or sly conduct. The uncontradicted testimony shows that the young lady was somewhat wayward, and was also lacking in careful management and preservation of her clothing and personal

articles. The affirmative proof on this subject and of the efforts of the guardian and judge of probate was not explained or contradicted by Mrs. Culp, and there was an entire absence of any show of want of good faith. The presumption is not against the guardian, and in the present case the auditor's report was of itself *prima facie* evidence, apart from all other considerations.

The claim that the outlay for clothing and other advances was excessive demands a little more attention. The expenditures for such purposes, where the articles are not out of proportion to the ward's social position, if made in good faith, and if not exceeding the ward's means, cannot usually be held improper, under the same discretion before referred to. Aside from their limitation on account of income, upon which we shall remark presently, a *bona fide* discretion cannot be properly reviewed, unless in such extreme cases as seldom can arise with any but large estates.

While it is just and necessary to require guardians to be careful, the law cannot and does not hold them responsible *ex post facto*, merely because some more prudent or sagacious person might have done better. The majority of guardians, especially of persons of moderate means, must be selected from friends or relatives who would take an interest in the child, and not upon mere financial and business principles.

Guardians on the average cannot be expected to be thoroughly versed in the niceties of law, or in the knowledge of business. Honesty and kindness, without more than a very ordinary skill in money matters, are about all that can usually be expected. It would lead to no good result to require such liabilities as would deter ordinary men from accepting such trusts, and would not only tend to keep out of the account the most essential elements of kindness and sympathy, but would probably have an equal tendency to encourage sharpness in those who are treated as dealing at their peril.

A guardian whose ward's estate is sufficient to furnish an income that will with economy maintain and educate her suitably, should not exceed it without adequate reason. But in this country, while it is prudent to obtain leave in advance, it

is not necessary, if circumstances justify the excess. But the rule is always to be applied with some discretion. The guardian is justified by the authorities in looking not merely at present and actual income but at future and probable resources. If the income is narrow he should also look to the future welfare and standing of his ward, which may in his eyes, as in those of a judicious parent, render it wise to secure desirable results by a sufficient outlay. In many if not in most cases, in this country, it is not possible to secure a regular and reliable revenue, which will not at times fail or be delayed. And when the infant's property is too small for the income to furnish reasonable nurture and support, the principal must necessarily be drawn upon.

Upon the present record it is not within our province to pass upon the facts. But it is proper to mention, that the expenses, apart from the guardian's charges, did not average per annum the ordinary legal interest upon the fund received in 1873, and still less on the whole fund received. Moreover, during the years when some of the largest outlays became necessary, particularly the piano, the fund was all in perspective, and there was no income to speak of. During the fifteen years of guardianship, there were less than four, when it was possible to have had the principal fund earning interest at all. If this question should ever come up again for serious consideration, all of these matters would have to be looked at. As the jury have found in the guardian's favor on this point, we need not refer to it further.

Upon the guardian's duty to invest, the findings on the record give us no definite *data*. We need only say, therefore, that he should be held for interest not actually received, only when his delay has been unreasonable. He may properly retain enough moneys to secure the means of making all necessary outlays, and he may wait until he can find safe investments in sums of reasonable amount. He should look not merely to the value of the security but to the promptness of the borrower, and need not accept without reference to this. For this reason public securities have always been held lawful. He cannot be censured for honestly investing in these or on

any legal interest where it is the best which he finds readily obtainable. He cannot be held for neglect beyond seven per cent. That is the rate imposed by law in the absence of contract. The cases in which compound interest may be charged to a delinquent we need not now discuss.

The question of the guardian's compensation is not put in a satisfactory shape for full consideration. There are, however, some things requiring attention. It seems to be supposed there are some rules of law which on a given state of facts would fix it. But this is a mistake. The matter is one left to the consideration of the court passing the accounts, and the amount has nothing to do with the account as an item of it at all, and cannot in any case be considered by the jury.

By the old law a guardian could get no compensation whatever, but was merely protected in his legitimate expenditures. The modern doctrine, which is recognized by our statutes, regards him as entitled to such reasonable compensation as the circumstances warrant. Many elements may enter into this determination. The size and character of the estate, the amount and kind of services rendered, the duration of the trust, the duties in the given case as involving oversight of the person to a greater or less degree, may all have their weight. All we can do in a case so imperfectly presented as this is, will be to refer, very generally, to the practice which seems most approved.

If a guardian is a professional man and renders professional services, there is no absolute right to demand pay for them on the same footing as a stranger, and yet in some cases it might be entirely proper. If the estate is large, and if the guardian is appointed chiefly for business purposes, there is no special reason why he should not be paid as a business man. But on the other hand in small or moderate estates, or where the helplessness of the ward and need of nurture and protection may be important elements in the choice, such a rule might be ruinous. Courts can never properly lose sight of the fact that primarily the duties are to be regarded as personal and honorary. Such offices are not to be given or assumed with a view to profit. The compensation must be proportioned not so much to

the market or usual value of such services as to the ability of the ward to bear them. A guardian when he has assumed the trust must be as faithful in a small estate as in a large one, without reference to the compensation. He should be paid fairly if the estate will allow it to be done without disproportion or injury. But if it will not, then he must be satisfied with a smaller reward. Upon the present record, if the ward had no estate beyond what was managed by the guardian, we should not regard his claims as made for \$300 a year, and \$500 extra fees, as reasonable.

We have already hinted that this record is badly framed. It seems to have been assumed that the proceeding in the Probate Court was one which, when removed into the circuit court, would become substantially a common-law controversy. This is a great mistake, and the statute has been misconstrued. A guardian's accounting is an equitable and not a legal proceeding. It involves not merely the ordinary items of debit and credit, but also considerations as to the propriety of charges and investments and as to the allowance of compensation, with which a jury cannot meddle. The statute does not in such cases contemplate a general trial or general verdict. It requires such matters of fact as are disputed to be submitted on proper issues to a jury. Comp. L. § 5,220. But in such issues as the present, although the findings of the jury, on proper instructions, may be more conclusive than those on a feigned issue, nevertheless they serve no other purpose than to determine definitely such specific facts as, when found, will aid the court in determining those questions which belong to the equitable discretion of the court itself. Such questions of discretion in a case like this, might include the responsibility of the guardian for failure to keep investments, the necessity or propriety of exceeding the income, the rate of compensation, and some others. We are not called on, and it would not be proper, to anticipate what issues ought to be framed in this case. None whatever were drawn up, and the jury proceeded under the rulings to do what belonged to the court.

No ground of appeal pointed out any objection to the securities actually taken, definitely, if at all, and no question was

made on the trial concerning them. But the final decree treated all the fund with one or two exceptions as uninvested. The guardian represents the ward in taking proper securities and has a right to turn them over. We have no finding in this case to determine whether they were proper or not.

The failure to account annually, as provided for by the Laws of 1873, is not necessarily to be regarded as a cause of forfeiture. That law in terms only requires accounting on citation, but it undoubtedly contemplates that it should be done without. But it has never been held that such a failure, unless leading to injury, should be visited with serious penalties.

Some other matters were discussed which we need not dwell upon. The case will have to go back and definite issues should be made up before they are submitted again to be disposed of on the facts. There will be no occasion to disturb the auditor's report which is based on the figures of the accounting.

The order of the circuit court must be reversed with costs, and the cause remanded for further action.

The other justices concurred.

As to liability of executor to pay interest on funds in his hands, see *Troup v. Rice*, 1 Am. Prob. R. 18, and cases in note.

FOOTE vs. SAUNDERS.

[72 Missouri, 616.]

ESTATE FOR LIFE.—POWER OF DISPOSING OF FEE.

A testator appointed his wife executrix, willed that his just debts be paid, and that his wife raise his children as she thinks proper, and bequeathed to her all his estate, "both real and personal, during her natural life or widowhood, and what then remains to be equally divided between my (his) children." *Held*, that the wife took a life estate in the realty, and that the words "what then remains" did not raise any implied power of disposition thereof.

Heren, Vories, Vineyard and Woodson, for appellants.

Willard P. Hall, for respondents.

HENRY, J. This suit was instituted to quiet title to certain real estate in Andrew county, Missouri. The plaintiffs are children and heirs of one James C. Hunt, deceased, and the defendants claim the land under a conveyance made by Diana A. Hunt, his widow, to one Abbott.

The controversy arises on the construction of the will of said James C. Hunt, who died in the State of North Carolina, seized of the land in this State, which is in litigation in this suit. The will was as follows:

In the name of God, amen. I, James C. Hunt, being weak in body, but of sound mind, do make this my last will and testament:

Item 1st. I will that all my just debts be paid, of which there are but few.

Item 2d. I give and bequeath unto my beloved wife, Diana A. Hunt, all my estate, both real and personal, during her natural life or widowhood, and what then remains to be equally divided among my children, viz.: Leonidas Hunt, Cynisca Hunt, George Bowen Hunt, James Martin Hunt, Elvira Bryan Hunt, and Susan Clemens Hunt.

Item 3d. I will that my wife raise my children as she thinks proper.

Item 4th. I will that my wife, Diana A. Hunt, be my executrix of this my last will and testament, this 28th day of June, 1847.

The appellants contend first, that, by the will, Diana A. Hunt took a fee simple estate in the land, or second, if not, at least a life estate with power to dispose of it in fee simple.

In support of the first proposition, they rely upon the doctrine that when the will imposes a charge, or trust on the person of the devisee, it creates a fee.

That doctrine has no application when a life estate is expressly devised, but only where an estate is given without words of limitation.

Chancellor Kent, in *Jackson v. Bull*, 10 John. 151, states the doctrine thus: "Where the charge is upon the estate, and there are no words of limitation, the devisee takes only an estate for life; but where the charge is on the person of the devisee, in respect of the estate in his hands, he takes a fee, on the principle that he might otherwise be a loser." This distinction will be found in all the cases on the subject. It was announced by Lord Mansfield in *Frogmorton v. Holyday*, 3 Burrows, 1624, in which he said that "the devisee, without words of limitation, can take an estate for life only," but if a personal charge be made upon him, "let the sum charged upon the devisee be ever so small, it shall give a fee." But in this case, there was no personal charge upon Diana A. Hunt. The first item of the will does not charge her personally with the payment of his debts, or any part of them; and the third item, so far from imposing a personal pecuniary charge upon her, leaves it to her to raise the children as she thinks proper. That is certainly too indefinite to create a personal charge upon the devisee.

There is more plausibility in the second position, that she took under the will a life estate with power to sell and convey.

There are adjudications in Maine and Massachusetts, and elsewhere, which favor the doctrine contended for by appellants: *Ramsdell v. Ramsdell*, 21 Me. 288; *Scott v. Perkins*, 28 Me. 22; *Shaw v. Hussey*, 41 Me. 495; *Harris v. Knapp*, 21 Pick. 413; *Paine v. Barnes*, 100 Mass. 470. They hold

that from the words "whatever shall remain," the implication is inevitable, that the first taker had a power to make such disposition.

On the other hand, in *Smith v. Bell*, 6 Peters, 74, a gift to a wife of all the testator's personal estate, with an absolute power of disposal expressly given, with a proviso that the remainder, after her decease, should go to his son, was held by the Supreme Court of the United States to be inoperative as to the power of sale, that the wife took a life estate only, and the son a vested remainder. C. J. Marshall delivered the opinion of the court, and used this language: "These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to the wife." "The limitation in remainder shows that in the opinion of the testator, the previous words had given only an estate for life."

The position of the court in that case was that the words "the remainder after her decease" qualified and limited the estate personally given, while here it is contended that they enlarge an express life estate into an absolute fee simple estate, or, at least, give an absolute power of sale. *Smith v. Bell* was followed by the Supreme Court of the United States in the recent case of *Brant v. Va. Coal & Iron Co.* 93 U. S. 332. But without committing ourselves to the extreme doctrine announced in those cases (in fact the contrary has been held by this court in *Owen v. Ellis*, 64 Mo. 77; *Campbell v. Johnson*, 65 Mo. 439, and *Owen v. Switzer*, 50 Mo. 322); we think they meet and answer the extreme views urged here, which find support in the adjudications of the highly respectable courts of Maine and Massachusetts.

It is a question of intention, and the intention of the testator, to be ascertained by taking and construing all parts of the will together, controls in its construction. It is on this ground that the devise of an estate without limitation, accompanied with a personal charge upon the devisee, gives him a fee.

That the clause of the will in question here did not confer a power of sale upon the widow, has been determined in this State, we think, in the case of *Gregory v. Cowgill*, 19 Mo: 415,

where the testator devised all of his estate, both real and personal, to his widow, to have and hold during her lifetime, except one slave, whom he emancipated. To his nephew, J. H. Gregory, by another clause of the will, he devised all that might remain of his estate, both real and personal, after the death of his wife, forever. The court held that no express estate for life was given to the widow, and that, "if the word 'remain' was sufficient to raise a power of disposition in the devisee for life, there were words in the will enough to give it an effect without applying it to the real estate. Some of the property was of a perishable nature, and some of it would be consumed in the use; it was not, therefore, designed that such portions should be accounted for to the remainder-man." There the words "all that might remain of his estate," related as well to the real, as the personal estate, by the express language of the will. Here, it would not be a violent construction of the clause of the will in question to hold that the words "what then remains," relate only to the personalty. In fact, such we take to be its meaning. In the same clause he gave all his real and personal estate to his wife during her natural life or widowhood, and what then remains to his children. The words "what remains" do not necessarily relate to the real estate, and as was remarked by Judge Scott in *Gregory v. Cowgill*, there are other words in the will sufficient to give effect to those words, without applying them to the real estate. This identical question was before the Supreme Court of Illinois, in *Siegnwald v. Siegnwald*, 37 Ill. 435, and decided in favor of the remainder-man; and to the same effect is the recent case of *Green v. Hewitt*, 97 Ill. 113; s. c. 12 Cent. L. Jour. 58.

That the deed of Mrs. Hunt to Abbott was intended by the grantor to convey the title in fee, we think clear, and also that the grantee purchased in good faith, and paid for the land its market value at the time. It is not so clear that the children of the testator, or their representatives, have received the benefit of the purchase-money. Mrs. Hunt is still, or at the trial of the cause was, alive. She testified that there was ample money and personal estate of the testator to educate and support the children, without selling any of his land. In this

statement she is corroborated by other witnesses, and there is no contradictory evidence in the record on that point. She also testified that the money received by her for the land was lent out by her, and, if there is any evidence to show that the children, or any of them, ever received any portion of it, we have failed to find it in the record. At the time of the sale they were not of an age to assent to or acquiesce in it. The estate had, at that time, suffered no impairment in the hands of Mrs. Hunt, nor has it since, so far as appears from the evidence.

The deed from Mrs. Hunt conveyed her life estate. This she had a right to sell and convey, without reference to the doctrine announced in *Owen v. Ellis*, 64 Mo. 77, and *Campbell v. Johnson*, 65 Mo. 439. It was not the execution of a power, but the exercise of a right of disposition of her own property, and her life estate in the land was all she had the right to dispose of, and nothing more passed by her deed to Abbott.

The judgment for plaintiffs is affirmed.

All the judges concur.

Bequest of Personalty for life with remainder over.—In Illinois, it is held that where there is a bequest of personal property to one, and "what remains," or "what may remain," or "should anything remain," is bequeathed over to another, or others, the first taker has an absolute estate; while in case of a devise of realty, the first taker has only a life estate, and the remainder-man has a vested remainder. *Green v. Hewett*, 97 Ill. 118; *Crozier v. Hoyt*, 97 Id. 23.

In North Carolina, it is held that the first taker has only a life estate in both real and personal property, and the remainder-man only a contingent remainder. *Hales v. Griffin*, 3 Dev. & B. Eq. 425; see also, as german to this point, *Williams v. Parker*, 84 N. C. 90; *Ellis v. Meadows*, 84 Id. 82.

In Maine, the first taker has a life estate in both real and personal, and where a testator gave his estate to his wife to hold and use "the same as if absolutely hers," and then directed that what was left should go to certain designated persons, it was held that these residuary legatees and devisees had only contingent interests. *Hall v. Otis*, 71 Me. 326; *Stuart v. Walker*, 73 Me. 145.

In Pennsylvania, the first taker has an absolute estate in both personalty and realty. *Post v. Dillon*, 8 Phila. (Pa.) 81; *Cox v. Rogers*, 77 Penn. St. 160.

In Tennessee, there seems to be life estates in each kind of property under

such a will, and vested remainders in the residuaries. *McGavock v. Pugsley*, 12 Heisk. 689; *Re Miller's Wills*, 2 Lea, 54.

In Ohio, a recent case holds that where a testator gave a life estate to his wife in his real and personal estate, and then made remainders to his three children, that the remainder, at her death, of the personal estate vests equally in the children. *Gillen v. Kimball*, 84 Ohio St. 852.

In Alabama, there is only a life estate for the first taker in realty and personalty. *Weathers v. Patterson*, 80 Ala. 404; *Ex parte Dickson*, 64 Ala. 188.

In Indiana, there is a life estate in realty for the first taker, and vested remainder in the residuary devisees. *Davidson v. Koehler*, 76 Ind. 898.

In Georgia, such a devise is held good only by way of executory devise. *Robertson v. Johnson*, 24 Ga. 102.

In New Hampshire, the first taker has a life estate in all the property, real and personal, given in this way. *Cartier v. Eaton*, 57 N. H. 154.

In Massachusetts, it has been held that the wife, under such a bequest, has only a life estate in personal property. *Andrews v. Bank of Cape Ann*, 8 Allen, 818; *Rogers v. American Board*, 5 Allen, 69.

But in a later case, where a testator gave his personal property to his wife, and the income of his real estate during her lifetime, and provided that "at her decease the property remaining be equally divided" among sundry of his relatives, it was held that the widow took the personal property absolutely as a legatee. *McKim v. Harwood*, 129 Mass. 75; and in *Taft v. Taft*, 180 Mass. 461.

Where a testator directed that residuary devisees should take any unexpended income, or any proceeds of the sales of lands, or any real estate not sold, it was held that these residuary legatees or devisees took only contingent remainders.

In Virginia, it has been held that a wife to whom movables were left, with power of disposal, took only a life estate in such as might be used and returned in kind, or, *e. g.*, a slave. *Madden v. Madden's Executors*, 2 Leigh, 877.

But where the residue of an estate is left to a wife, and a limitation over to another of "whatever she may leave," the wife is held to take an absolute estate in such residuum. *Elcoa v. Lancastrian School*, 2 P. & H. 58.

In New York, where a testator disposed of his property, viz.: I give and bequeath all my property, real and personal, to my wife, only requesting her, at the close of her life, to make such disposition among the children and grandchildren as shall seem to her good," it was held, in a recent case, that the wife took all the property, real and personal, absolutely. *Foose v. Whitmore*, 82 N. Y. 405; s. c. 1 Am. Prob. R. 577.

It appears from the cases cited that there is no inflexible rule, nor even any general rule. The intention of the testator, as in other cases, expressed, or to be gathered from his language in the will, is held to govern.

The English rule is no better established. Each case is found to be a law to itself. *Goodtitle v. Maddern*, 4 East, 496; *Moor v. Dean*, 2 Bos. & P. 247.

See *Stuart v. Walker*, *infra*, p. 79; *Copeland v. Barron*, *infra*; *Johnson v. Id.* *infra*, and note; *Wetter v. Walker*, 1 Am. Prob. R. 519.

STUART, EXECUTOR *vs.* WALKER, ADMINISTRATOR.

[72 Maine, 145.]

DEVISE OF REAL ESTATE WITH POWER OF DISPOSAL.—WHEN LIFE-ESTATE AND WHEN FEE.

Where a testator devises an estate in general terms, without specifying the nature of the estate, and gives the devisees a power of disposition of the property, providing a limitation over; if the power of disposal is unconditional, the devisee takes a fee; if conditioned upon some certain event or purpose, he takes a life estate only.

Where an estate is devised to a person expressly for life, with a power of disposal qualified or unqualified, the devisee takes an estate for life only, with a power to dispose of the reversion.

The testator made a devise and bequest (discarding redundant words), running thus: "I devise and bequeath to my wife the rest of my estate, real and personal, with the right to use, sell or otherwise dispose of the same, and the income and increase thereof, according to her own will and pleasure, during her lifetime. And so much of said estate, with the increase, income and proceeds thereof as may remain unexpended and undisposed of by her at her decease, I give," &c.

Held, this devise gives, in express terms, an estate to the wife, limited to her lifetime, not to be extended by any implication arising from the power of disposal annexed; the words, "during her lifetime," qualifying all the previous clauses of the devise.

Held, also, that the estate devised, with its income, increase and proceeds, real and personal, into whatever form converted or appropriated, so far as the same can be traced and identified, which remained unexpended by the wife at her death, should be surrendered, conveyed and paid over to those persons who were secondarily entitled to the estate under the will.

DEMURRER to bill in equity.

The bill sets out that Daniel C. Berry made a will September 15, 1873, containing the devises stated in the opinion. After his death, his will was duly probated and allowed, and the plaintiffs and widow, Mary Berry, were appointed executors at the November term, 1873. In 1875, Mary Berry married Love Straw, with whom she lived until July 5, 1878, when she died intestate and childless, and Elliot Walker was duly

appointed administrator on her estate. The other defendants are the surviving husband and heirs of Mary Straw.

And the bill further shows that the questions and controversies which have arisen are mainly, if not wholly, embraced in the following propositions:

First. What was the nature of the estate which Mary Berry took under the will of Daniel C. Berry?

Second. Who are entitled under the provisions of said will and acts of said Mary Straw and facts above stated, to have and hold the estate, real and personal, as above named. Whether the heirs and representatives of said Mary Straw, or the heirs of said Francis L. Sargent and devisees, under fourth clause of said will?

Third. To whom is the administrator of the estate of Mary Straw to account for personal property remaining in his hands upon settlement of his account?

Wilson & Woodward, for the plaintiffs.

Charles P. Stetson & E. Walker, for the defendants.

PETERS, J. A testator makes the following devise: "I give, devise, and bequeath unto my wife, Mary Berry, all the rest and residue of my estate, real and personal, of what kind soever and wherever situate, with the right to use, occupy, lease, exchange, sell or otherwise dispose of the same, and the increase and income thereof, according to her own will and pleasure during her lifetime. Meaning and intending hereby that the said Mary Berry during her lifetime shall have the absolute right, power, and authority to use and dispose of, by sale or otherwise, all said devised estate, real and personal, for her own support, and for any and all other purposes to which she may choose to appropriate it.

"And so much of said estate so devised to my said wife, together with the increase, income and proceeds thereof, as may remain unexpended and undisposed of by her decease, I give, devise, and bequeath unto the said Frances L. Sargent, her heirs and assigns forever, if she shall be then living; and if not

living, then to such children or child of said Frances as may be living at that time."

Did Mary Berry take a fee simple, or only a life estate, in the property devised?

The defendants contend that, where a life estate is devised, whether impliedly or expressly given, with an unqualified power of disposal annexed, a gift or limitation over is of no effect. That is true where the life estate is created by *implication*, but not true where it is *expressly* created in direct and positive terms.

A life estate by implication usually arises, where a donor devises property generally, without any specification of the quantity of interest, and adds some power of disposition of the property, and provides a remainder. For instance: A. gives an estate to B., with a power of disposal annexed, and a gift over to C. Here is an association of purposes and intentions, divisible into three parts. What does A. mean by all of them combined? What is implied by them?

A. first gives the estate to B. in general terms. Stopping there, by our revised statutes, he gives an estate of inheritance. But an estate in fee first described, may be cut down to a lesser estate by subsequent provisions.

A power of disposal is annexed by A. to his bequest to B. The effect of this depends upon whether it is a qualified or an unqualified power. If it is an absolute and unqualified power, it really neither takes from, nor adds to, the amount of the estate previously given, though there be a gift over. It would be merely equivalent to adding words of inheritance, making the gift to B. and his heirs and assigns. But those words were implied before. The law presumes in such case, that a testator superadds the unlimited power of disposal, to make his intention as emphatic and unequivocal as possible. The gift over in such case, is regarded as repugnant to and controlled by prior provisions. There is nothing to go over. A man cannot give the same thing twice. Having given it once, it is not his to give again. Such a devise comes within the principle of the class of cases where a testator gives an estate of inheritance, and then undertakes to provide that the devisee shall not alien the property; or that it shall not be taken for his

debts; or that he shall dispose of it in some particular way indicated; provisions which are powerless to control the prior gifts.

But where the power of disposal is not an absolute power, but a qualified one, conditioned upon some certain event or purpose, and there is a remainder or devise over, then the words last used do restrict and limit the words first used, and have the force and efficacy to reduce what was apparently an estate in fee to an estate for life only. Thus: A. gives an estate to B., with the right to dispose of as much of it, in his lifetime, as he may need for his support, and if anything remains unexpended at B.'s death, the balance to go to C. Here there may be something to go over. B. is to dispose of the estate only for certain specified purposes. He can defeat the remainder, only by an execution of the power. The clear implication of such a bequest, taking all its parts together, is that B. is to possess a life estate. Here a life estate is implied, and is not expressly created.

But A. makes this devise: "I give to B., my estate to have and hold during his lifetime and no longer, with the right to dispose of all the same during his lifetime, if he pleases to do so, and any unexpended balance I give to C." Here a life estate is *expressly* created, instead of arising by *implication*. Here, an absolute and unqualified power of disposal annexed, does not enlarge the estate to a fee. Where an estate is expressed, it need not be implied. Absolute control does not amount in such case to an absolute ownership. There is no conflict between the three parts of such a devise. Each clause in the combination may be literally executed. They are in no wise inconsistent with each other.

An examination of the cases invoked to the aid of the defendants, shows that all or nearly all of them pertain to life estates by implication, and are mostly instances where the purpose was, not to extend a life estate, but to reduce what was apparently an estate in fee. In some of the cases cited, may be found general expressions appropriate enough in the connection where used, which would be misleading when applied to devises such as the one now presented.

The English cases cited fail to sustain the defendants' view. As favorable a case as any upon their briefs, is *Parnell v. Parnell*, L. R. 9 Ch. Div. 96. There the words of the testator were: "I give and devise to my wife, my real and personal property for her sole use and benefit. It is my wish that whatever property my wife might possess at her death, be equally divided among my children." The question was, whether the property was affected by a trust for the benefit of the children, which would debar the widow, then living, from disposing of it. The court replied that there was no definite gift over and no trust. It will be noticed that the gift was absolute, and not in any express words limited to an estate for life. *Breton v. Mockett*, Id. 95, is also much relied upon by the defendants. In that case it was declared that a gift for life, to the wife of the giver, of farming stock and materials, she not to be liable for diminution or depreciation, gave an absolute property in those articles which *ipso usu consumuntur*. The question was, whether the widow was entitled to the proceeds on a sale of the articles. But that case is an exception to the general rule. "There is an exception to the rule in case of the bequest for life of specific things, such as corn, hay, and fruits, of which the use consists in the consumption. Such a gift is in most cases, of necessity, a gift of the absolute property." 1 Jarman on Wills, 5th ed. (Bigelow), p. *879, and cases in note. In *Merrill v. Emery*, 10 Pick. 512, it is said, "that where the use of things is given, which are necessarily consumed by the use, the gift is absolute, and the limitation over is void." It is plain enough that the principle of those cases does not apply to the case at bar.

Nor do our own cases support the position advocated by the defendants. In no case in this State has it been directly or indirectly held that, where there is a devise for life in express terms, a power of disposal annexed, can enlarge it to a fee. In most instances, the question involved has been whether the gift to the primary legatee was absolute or qualified, in view of the ambiguous or contradictory expressions used; the decisions being based upon the supposed intention of the testator as collected from the whole will.

The only point necessarily decided in *Ramsdell v. Ramsdell*, 21 Maine, 288, was, that the title to property passed to a purchaser, where the donee had sold the property under a power of disposal and converted the proceeds of the same to his own use. The opinion generalizes considerably upon the doctrine of the books upon this subject-matter, and some of its general statements would be more appropriate to the facts of that case than to this. Still, the case demonstrates that the learned jurist who pronounced the judgment in that case, had in view an estate for life, created by implication, and not one expressly created. The distinction set up here was clearly acknowledged there. The household goods were, in that case, decided to be the property of Sarah Crumpton only to the extent of a life estate therein, because expressly so declared in the will; and a different rule was applied to the other property devised, for the reason that the donee's interest in such other property was not limited to a life estate by any express word in the will. It is there said: "It cannot be reasonably supposed that it could be the intention of the testator to give only an estate for life, unless there be words clearly declaring such an intention."

That the general principle enunciated in *Ramsdell v. Ramsdell*, was intended to apply only to a life estate created by implication, is made more manifest in *Pickering v. Langdon*, 22 Maine, 413; in which the court expressed its inability to extend into a fee an estate which was by the testator expressly described as being for a lifetime. And it is in the latter case said, "The general intent to dispose of the whole of the property, cannot, therefore, authorize the court to destroy or disregard the other and different purpose to give to Paul and his wife, estates for life." In *McLellan v. Turner*, 15 Maine, 436, the same judge who delivered the judgments in the two cases before named, said: "If it were admitted that a power of disposal existed, she would not take a fee, there being an express devise to her for life."

In *Jones v. Bacon*, 68 Maine, 34, it was held that an absolute power of disposal in the first taker, renders a subsequent limitation repugnant and void. But that was a case where the contention was, whether the first taker had or not an estate for

life by an implication from all parts of the will construed together. The language of the will there was, "As to the residue of my estate, I give and bequeath the same to my beloved wife." These are words of inheritance. It would have been a different thing altogether had the testator said, "I give and bequeath the same to my wife *for her lifetime*." In that case the bequest was in general terms, unqualified, except by the limitation over; while in the case at bar the bequest is for a lifetime only. *Jones v. Bacon* falls within the rule laid down in *Ramsdell v. Ramsdell*, *supra*; although both cases are in conflict with the case of *Smith v. Bell*, 6 Pet. 68, a case differing somewhat from many of the authorities. See *Gifford v. Choate*, 100 Mass. at page 346.

In *Shaw v. Hussey*, 41 Maine, 495, the doctrine is truly stated; that a devise of land to another, generally or indefinitely, with a power of disposing of it, amounts to a devise in fee; but that, where a testator gives to the first taker an estate for life, only by certain and express terms, the fee does not vest in the legatee. Other cases clearly illustrate the same rule. *Fox v. Runnery*, 68 Maine, 121; *Warren v. Webb*, Id. 133; *Jones v. Leeman*, 69 Maine, 489; *Starr v. McEwan*, Id. 334. The question is most elaborately and exhaustively examined in cases in New York and New Hampshire, a reference to which saves the necessity of citing and comparing a long list of authorities. *Burleigh v. Clough*, 52 N. H. 267; *Jackson v. Robins*, 16 Johns. 537. Some of the later English chancery cases cast light upon the question. *In re Stringer's Estate*, L. R. 6 Chan. Div. 1; *In re Hutchinson*, L. R. 8 Chan. Div. 540; *White v. Hight*, L. R. 12 Chan. Div. 751. The Massachusetts cases, when correctly understood, are not in opposition to the doctrine. Their latest case affirms it. *Ayer v. Ayer*, 128 Mass. 575.

The text books sustain the doctrine fully. Chancellor Kent says: "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee; unless the testator gives to the first taker an estate for life only, and annexes a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power,

prevent it from enlarging the estate to a fee." 4 Kent's Com. *535.

Cruise says, "Although a devise to a person generally, with a power to give and dispose of the estate as he pleases, creates an estate in fee simple; yet where an estate is devised expressly for life, with a power of disposal, the devisee will only take an estate for life, with a power to dispose of the reversion." Cruise Dig. tit. 38, c. 13, § 5.

Bacon says, that "devises by implication are allowed where the intention may be presumed, though it be not expressed in plain words; yet there is no room for such construction where a devisee has an estate given him by express words in the will; for that would be to overrule the plain meaning of the testator against his own words." (Abr. Leg. and Dev. G.)

In 1 Roper's Leg. *643, it is said: "Where a particular estate is limited in the instrument, followed by a declaration that the legatee may dispose of the fund, he will not take a beneficial interest in the capital. He will have a mere power to dispose of it, and no more; because, where a limited interest is expressly given, its enlargement by implication will not be permitted."

Jarman says: "If there is a distinct, positive gift (to the primary legatee), and the intention is express, nothing that afterwards follows can affect the construction of the positive gift." 1 Jar. Wills, 5th ed. (Bigelow), *873, and cases in notes. See *Ward v. Emery*, 1 Curtis, 425.

A doubt is raised by the defendants, whether, in the present case, there is a devise for life by express limitation. Nothing could be much plainer; all her rights and powers are limited by her duration of life. The words "during her lifetime" qualify all preceding words in that clause of the will; affecting both the quantum of interest in the estate and the power of disposal. Any other construction would expunge from the will most of the provisions in it. The testator gives a fee in other instances in apt and proper terms, whenever he designs to do so. He appoints executors; makes careful provisions appertaining to the expected remainder; significant evidence of the intention. An estate for life is not for more than life,

but for life only. The maxim *expressum facit cessare tacitum* governs.

We have no doubt that the estate devised to the wife, with all the income, increase and proceeds of it, real and personal, into whatever form appropriated or converted, so far as the same can be traced and identified, which remained unexpended at her death, should be surrendered, paid over and applied according to the prayer of the bill. That the same rule applies to the proceeds of the property sold by the widow, and not expended at the time of her death, as to the original property itself, is determined in *Hall v. Otis*, 71 Maine, 326.

Demurrer overruled. Bill sustained; with decree as indicated in opinion; without costs.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

See Foote v. Saunders, *ante*, and note; Copeland v. Banon, *infra*; Johnson v. Id. *infra*, and note; Wetter v. Walker, 1 Am. Prob. R. 519.

BRITT vs. SMITH.

[86 North Carolina, 305]

RESIDUARY BEQUEST OF PERSONALTY. — RIGHT TO POSSESSION OR SALE OF PERISHABLE ARTICLES.

The rule, that where personal property is given by will to one for life with remainder over, the executor shall sell so much of it as is of a perishable nature, applies only to the case of a residuary bequest given *eo nomine* as such; and this rule, being one of construction, must be relaxed when necessary to give effect to the intention of the testator.

A testator devised and bequeathed to his wife during her life all his land and all his personal property, and in a subsequent clause of the will (after certain specific legacies) he gave his sister at the death of his wife all the balance of his personal property of every description, not heretofore disposed of; at his death, the personal property consisted of farming implements, crop, stock, notes, &c.

Held, that the widow is entitled to have the specific articles of personalty delivered to her as tenant for life.

CIVIL ACTION for construction of will.

This action is brought by the personal representative of B. H. Smith, deceased, for the purpose of having ascertained the respective rights of the defendants, Tabitha E. Smith and Zilpha M. Edwards, under the will of the said Smith, the said Tabitha E. being his widow, to whom was given his estate real and personal for life, and the said Z. M. Edwards being his sister, to whom his personalty was given in remainder. The will provides as follows:

"Item 1. I leave and devise to my beloved wife, Tabitha E. Smith, during her natural life or widowhood, all of my landed estate that I may possess at my death, and also all of my personal property under same restrictions as that of my real estate, except as is hereinafter provided; and after her death or widowhood, and if I should have no heirs of my body, then I give and devise to W. F. Edwards' two daughters, Cornelia and Zilpha, all of my real estate in fee.

"Item 2. I devise at my death that my administrator shall pay to Richard G. Smith and Elizabeth J. Smith, children of my half brother, Thomas Smith, the sum of three hundred dollars each, to be paid out of my personal property.

"Item 3. I give and devise to my sister, Z. M. Edwards, wife of W. F. Edwards, at the death of my wife, all the balance of my personal property of every description, not heretofore disposed of, to have," &c.

The testator died possessed of the tract of land whereon he resided, and of personalty consisting of hogs, cattle, a horse and mule, corn, cotton, pork, lard, bacon, wheat, farming utensils, household and kitchen furniture, cash on hand, and notes and accounts amounting to some \$1,400. The notes and accounts have been collected, and the money used in paying the money legacies under the will and the debts of the testator, leaving a balance in the hands of the administrator of some \$320.

The question presented is, whether the administrator shall

deliver the personalty in kind to the widow as tenant for life, or whether he shall convert it into money and pay her the interest only, reserving the principal to be paid, upon her death, to the sister as remainder-man, and the court held that plaintiff deliver the same to the defendant, Tabitha, from which ruling the defendant, Zilpha M. Edwards, appealed.

Messrs. Grainger & Bryan, for plaintiff.

Mr. W. C. Munros, for defendant.

RUFFIN, J. There can be no mistaking the rule as laid down in *Smith v. Barham*, 2 Dev. Eq. 420; *Jones v. Simmons*, 7 Ired. Eq. 178, and *Ritch v. Morris*, 78 N. C. 377, and which must be taken, as was said by Mr. Justice Bynum in the last of these cases, as the settled doctrine in this State. It is, that whenever personal property is given, in terms amounting to a residuary bequest, to be enjoyed by persons in succession, the interpretation the court puts upon the bequest is, that the persons indicated are to enjoy the same in succession; and in order to give effect to its interpretation, the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder.

The rule, though declared by the courts of England so long ago as the time of Lord Eldon in *Howe v. The Earl of Dartmouth*, 7 Ves. 137, and frequently affirmed since, has never been a favorite one with those courts; and the effect of the later cases has been to allow very slight indications of a contrary intention, on the part of a testator, to prevent its application (*Morgan v. Morgan*, 14 Beavan, 72), and such certainly has been the tendency of the decisions made in this court, as may be seen by reference to *Taylor v. Bond*, Busb. Eq. 5; *Williams v. Cotten*, 3 Jones' Eq. 395; and *Chambers v. Bumpass*, 72 N. C. 429.

So far as we have been able to inform ourselves, from a critical examination of all the adjudications upon the subject,

to which we have access, no operation has, in any instance, been given to the rule, save in the case of a *residuary bequest*, given *eo nomine* as such. In *Smith v. Barham*, *supra*, the very point seems to have been made—the language of the judge who delivered the opinion, being thus: “It is clear, that where a *residue* is given *as such*, it is to be sold by the executor. The several things are not given, the testator supposing them not worth giving as *corpora*, not knowing how much or which of them it may be necessary to sell for the payment of debts or other legacies.” So too, by the Court of Appeals of South Carolina, in *Patterson v. Devlin*, 1 McMullen’s Eq., 459, in the case of a bequest of articles necessarily consumable in the use, to one for life with remainder over, a conversion by sale was allowed, upon the ground that it had been given as a *residuum* of the testator’s estate—he having disposed of its bulk in previous clauses of his will, to those for whom it was his purpose mainly to provide—and the reason expressly assigned for making the decree is, that it was a residuary bequest, made up of the odds and ends of his estate; and consisting of things difficult to enumerate, the possession of which was not deemed of consequence to the life-tenant, and not essential to the enjoyment of other provisions made for him.

If such be the true test for the application of the rule, what a gross misapplication would it be to allow it to operate in this case! Here, the bequest to the wife, while in a certain sense it may be said to consist of the residue of the estate, that is, the surplus after the payment of debts and special legacies, differs in every material circumstance from the *residue* spoken of in those two cases. So far from being made up of worthless *corpora*, or the fragments of the estate, it embraces the whole thereof, with the slight exception of six hundred dollars, given in the way of pecuniary legacies, and to be paid, as he must have known, without resorting to a sale; and it is composed too of articles of the very first necessity and daily consumption, and such as he must have had all the while before his eyes.

But, at most, the rule is one of construction, designed to give effect to the intention of the testator, and will yield when-

ever he manifests a different one, or when it cannot be applied without defeating what seems to be his main purpose; and it is therefore the duty of the court, in every such case to look at the whole will, to ascertain if possible the intention there disclosed.

Looking at the one we are now called on to construe, we are struck at the very outset with the strong purpose manifested by the testator, to make an ample and certain provision for his wife. By one comprehensive clause he gives her *all* his lands for life, and with the slight exceptions indicated, *all* his personalty, the latter consisting, in a great degree, of articles absolutely essential to the enjoyment of the former, and indeed, we may say, necessary to her immediate comfort and support, and such as she could not supply, in the event of a sale, without incurring debt, or other inconvenience.

We cannot, therefore, for one moment suppose that contrary to his express words thus used, his real intention was not to give her any part of his personal property, but that it was designed that his representative should sell the same, and pay her its annual income for life; that his lands were to lie idle for want of animals and implements to work it; his home abandoned for the lack of furniture to render it habitable; that for a bed upon which to lie she should become a debtor to his estate; and all this for the benefit of a sister whose claims upon him he evidently regards as secondary to those of his wife. Nor are we left to mere inference in the matter. The will itself, in the very clause in which provision for his sister is made, bears strong, substantive proof as to his real intention. The words used are as follows: "I give to my sister Zilpha M. Edwards, at the death of my wife all the balance of my personal property of *every description* not heretofore disposed of." Why speak of its being "*property of every description*" at the death of his wife, if it was intended that it should be converted into money, and could therefore be of but one description?

It is the duty of the administrator to assent to the legacy in favor of the testator's wife, and to deliver to her the money in his hands and other personal property, taking an inventory

for the benefit of the remainder-man, of all, except such as must be necessarily consumed in its use.

A judgment may be drawn in accordance with this opinion.

No error.

Judgment accordingly.

See Brannock v. Stocker, *infra*, and note.

PALMER, EXECUTOR *vs.* HORN.

[84 New York, 516.]

MEANING OF "ISSUE" AND "CHILDREN" AS INCLUDING "GRAND-CHILDREN."

A testator directed his executors to divide the sum of \$20,000 into as many shares as there should be lawful issue of my deceased nephew, Matthew Horn, living at his death, and to invest the same and apply the income of each of said shares "to the use of each of said children respectively." At the time of the execution of the will and of testator's death, Horn had living three children and seven grandchildren, two of them children of a deceased daughter. *Held*, that the provision did not include any of the grandchildren.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order which affirmed a judgment entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiffs as executors of the will of Frances B. Hegeman, deceased, to obtain a construction of certain clauses in her will. The only one in question here was the seventh clause, which is set forth in the opinion, with the facts pertaining thereto.

Milton A. Fowler, for appellant.

John Reynolds, for respondents.

EARL, J. This action was brought to obtain a construction of the will of Frances B. Hegeman, deceased. The seventh clause of the will only needs consideration upon this appeal, and that is as follows: "To divide the sum of twenty thousand dollars into as many shares as there shall be lawful issue of my deceased nephew, Matthew Horn, living at my death, and to invest the same and apply the interest and income from each of said shares to the use of each of the said children respectively, and as they respectively depart this life to pay over the principal of said share to their lawful issue, share and share alike."

The will was executed in 1876, and the testatrix died in 1877. At both dates there were living three children of Matthew Horn, the defendants, Mrs. Sutton, Mrs. Haight and Mrs. Ely. Another child of Matthew, Mrs. Berry, died in November, 1872, leaving two children, the appellants, Nellie Berry and Charles Berry, who, at the death of the testatrix, were under eight years old.

Mrs. Sutton, Mrs. Haight and Mrs. Ely claim that they are the "lawful issue" and "children" of Matthew Horn intended by the seventh clause of the will; and it is claimed on behalf of the two infant appellants that they also are included among "the issue" and "children" of Matthew, within the meaning of that clause. The Supreme Court has determined that they are not so included; and whether that determination is right, is the sole question for our solution.

The word "issue" is an ambiguous term. It may mean descendants generally or merely children; and whether in a will it shall be held to mean the one or the other, depends upon the intention of the testator as derived from the context of the entire will, or such extrinsic circumstances as can be considered. (*Doe ex dem. Cannon v. Rucastle*, 8 C. B. 876; *Italiph v. Carrick*, L. R. 11 Ch. Div. 873; *Earl of Orford v. Churchill*, 3 Ves. & B. 59, 67.) In England, at an early day, it was held, in its primary sense, when not restrained by the context, to be co-extensive and synonymous with descendants, comprehending objects of every degree. But it came to be apparent to judges there that such a sense given to the term

would, in most cases, defeat the intention of the testator, and hence in the latter cases there is a strong tendency, unless restrained by the context, to hold that it has the meaning of children. It will at least be held to have such meaning upon a slight indication in other parts of the will that such was the intention of the testator. (2 Jarman on Wills [R. & T. ed.], 635; 2 Redf. on Wills [2d ed.], 34, 37, and note.) And substantially the same rule of construction prevails in this country. In 4 Kent's Com. 278, in a note, the learned chancellor said: "The term *issue* may be used either as a word of purchase or of limitation, but it is generally used by the testator as synonymous with child or children."

Here it is clear from indications found in this will, that the testatrix used the term "issue" as synonymous with children. She did so in several clauses of the will, and in the very clause under consideration the words "said children" refer to the "lawful issue" before specified. By the word "children" the testatrix herself has interpreted the word "issue."

A case very much in point is *In re Hopkins' Trusts* (L. R. 9 Ch. Div. 131). In that case a testator by his will gave a fund to trustees, in trust for the lawful *issue* of F. H. surviving him, equally to be divided between them, if more than one, and if but one, then for such only *child*, with a gift over in default of issue of F. H. The issue of F. H. who survived him were a son, a daughter, four children of the son, and six children of a deceased daughter. It was held that by the use of the word "child" the testator had himself interpreted the word "issue," and that the word "issue" must be restricted to children, and that the fund should go in moieties to the surviving son and daughter. In *Baker v. Bayldon* (31 Beav. 209), a testator gave legacies to his nieces, with power to his executors to settle them on his nieces for life, and at their deaths for the benefit of their "issues." He also gave them his residue, with like power to settle it on his nieces and for the benefit of "their respective children," as provided with respect to the legacies. It was held that the testator, by the subsequent use of the word "children," had explained what he meant by the word "issues," and that the children of nieces

took, to the exclusion, of grandchildren. (See, also, *King v. Savage*, 121 Mass. 303, and *Taylor v. Taylor*, 63 Penn. 484.)

But the further claim is made that the word "children," in the seventh clause, was used in an enlarged sense, and was intended to include all the "issue" of Matthew Horn, immediate and remote, and hence the infant appellants. But such a construction would be unwarranted. It is a general rule that the word "children" must be understood, in wills, in its primary sense and simple signification, when that can be done, and always when there are any persons in existence at the date of the will, or before the devise or legacy takes effect, answering such meaning of the term. Where the term has received a larger and more extensive construction, as synonymous with issue, it has generally been based upon something in the will, unless it resulted, as just intimated, from the fact that there were no children in existence. The rule is well stated thus in *Mowatt v. Carow* (7 Pai. 328): "The word 'children,' in common parlance, does not include grandchildren, or any others than the immediate descendants in the first degree of the persons named as the ancestor. But it may include them where it appears there were no persons in existence who would answer to the description of children, in the primary sense of the word, at the time of making the will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of other words, that he used the word 'children' as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren or stepchildren." (See, also, *Feit's Exrs. v. Vanatta*, 21 N. J. Eq. 84; *Reeves v. Brymer*, 4 Ves. 698; *Migaw v. Field*, 48 N. Y. 668.)

Here there are children of Matthew Horn to take. There is nothing in the context or extrinsic circumstances to show that the word "children" was used in an enlarged sense. The infant appellants are not disinherited by giving the word its primary sense, as they were not heirs of the testatrix, and were so remotely related that they would have taken none of her estate if she had died intestate. We have no means of ascertaining whether the testatrix had them in mind when she made

her will, and actually intended that they should share in her bounty. It is enough to know that the language used, properly construed, does not include them.

The construction contended for would certainly defeat the intention of the testatrix, because that would bring in the three children of Mrs. Sutton, and two children of Mrs. Ely, all living at the date of the will, as well as the two appellants, to share equally with Mrs. Sutton, Mrs. Haight and Mrs. Ely; and thus the bequest in the seventh clause would be divided into ten shares, and the children of her nephew would be placed on a footing of equality with his grandchildren. It cannot be supposed that she intended such a disposition of her bounty.

The will was properly construed by the court below, and its judgment should be affirmed, with one bill of costs to the respondents who appeared in this court, to be paid out of the estate.

All concur.

Judgment affirmed.

LINNARD'S APPEAL.

[98 Penn. St. 313.]

ALTERATION OF WILL.—SUBSTITUTING LESS SUM FOR GREATER NO
REVOCATION.—PRESUMPTION AS TO TIME OF ALTERATION.

Testatrix in her will gave a legacy of five hundred dollars. Subsequently she drew her pen across the word five and wrote the word and figure three. *Held*, that the intention was not to revoke the gift, but to reduce its amount. Alterations in testator's handwriting in a will are presumed to have been made before execution, or if made afterwards and there be codicils, then before the execution of the last codicil.

APPEAL from the Orphans Court of Philadelphia county.
Appeal of Eugene Linnard, trustee of Cornelia Purnell,

from the decree of the court in the distribution of the estate of Katherine M. Linnard, deceased.

Miss Katherine M. Linnard died September 22d, 1878, leaving a will dated December 5th, 1877, with sundry codicils thereto, which was duly admitted to probate, and letters testamentary issued thereon September 26th, 1878.

By said will she bequeathed in pecuniary legacies nearly \$19,000, while the balance for distribution in the hands of the accountant only amounted to \$13,521 81.

By the seventh clause of her will she provided as follows: "I give and bequeath to my nephew, Eugene Linnard, the sum of ^{three 8} ~~five~~ hundred dollars, in trust, to invest and keep invested ₈ the same during the life of Cornelia Purnell (Neely), and to pay over the income thereof unto her so long as she may live; and at her decease, I direct that the said sum shall become part of my residuary estate."

John R. Read and Silas W. Pettit, for appellant.

STERRETT, J. The will of Miss Linnard, consisting of the original paper, dated December 5th, 1877, executed in the presence of two subscribing witnesses, and four codicils signed by her but not dated or witnessed, was admitted to probate September 26th, 1878, four days after her decease. The original paper was re-signed by the testatrix immediately below and in connection with the attestation clause over date of December 13th, 1877. Sometime thereafter she made several changes in her will by drawing a pen transversely across the words creating some of the legacies, and in one instance she substituted a sum different from that originally written. In the seventh item she had given to her nephew, the appellant, \$500, in trust, to invest and pay the income to Cornelia Purnell during her life, and at her decease the principal to fall into her residuary estate. She altered this bequest by drawing her pen across the word "five" and writing over it the word "three," and also placing the numeral "3" both above and beneath the erased word. In a similar manner she erased a

clause in the second item, giving a legacy of \$500 to Eugene, son of her nephew John J. Linnard, and, in the sixth item, a legacy of \$200 to another person; and also the second paragraph to the first codicil, together with her signature thereto, in which she had made a different disposition of the \$500 legacy stricken out of the second item of the will. After or in connection with the erasure of the paragraph referred to she appears to have completed and signed what now appears as the first codicil. The other codicils, without date or subscribing witnesses, follow in their order. The will as probated exhibits these erasures and alterations; the words erased in the manner above stated are all distinctly legible.

The act of the testatrix in thus striking out the words in the second and sixth items was evidently intended to operate as a cancellation of her will as to these clauses, and was quite sufficient for that purpose; but no such intention can be inferred from the erasure and interlineations in the seventh item. It is very clear that it was not her intention to cancel it, or wholly revoke the legacy. Her object was simply to reduce the amount from \$500 to \$300; and by holding, as the court did, that, in the absence of proof of re-execution after the alteration was made, the substituted legacy could not be sustained, her intention was defeated. While the Act of 1833 provides that no will in writing shall be repealed, nor shall any devise or direction therein be altered otherwise than by some other will or codicil in writing, &c., it cannot be doubted that the execution of the second or either of the subsequent codicils, after the alteration, would have the effect of confirming the will as thus altered, and would be a sufficient compliance with the act. A duly executed codicil operates as a republication of the original will so as to make it speak as of the date of the codicil. *Coale v. Smith*, 4 Barr, 376; and, it not only operates as a new adoption of the prior will to which it refers, but also as a revocation of an intermediate will. *Neff's Appeal*, 12 Wright, 501. In *Wikoff's Appeal*, 3 Harris, 281, Chief Justice Gibson, speaking of interlineations, proved to be in the handwriting of a testatrix, says: "The presumption is that they were made at or before the time when the will was prepared for the

final act." So in the present case it may fairly be presumed that the alterations, admitted to be in the handwriting of Miss Linnard, were made before she appended her signature to the last codicil. If this be so, the testamentary paper as altered, including the codicils, speaks as of that date, and should be regarded as her will, properly executed at that time. It is stated as a fact that the alterations were not made before the original paper was re-signed on December 13th, 1877; but it does not follow from this that they were not made before the last or some of the preceding codicils were executed. Indeed, the fair inference from the paper itself would seem to be that they were made before the second codicil. As has already been observed, the clause stricken out of the first codicil, before it was completed, refers to the cancelled legacy in the second item of the original paper, so that it may be fairly inferred that this was done before the testatrix signed what now stands as the first codicil; and it is quite probable that the alterations in the original paper were all made at the same time. But however that may be, the presumption is that she made them before she affixed her name to the last codicil. Her signature to that having been duly proved should, in the absence of evidence to the contrary, be regarded as her final act.

Moreover, the probate of the will as we now find it, was an adjudication of its due execution, including, by necessary implication, the republication of the instrument after the alteration in question was made. This established, *prima facie* at least, the validity of the legacy; and certainly, in the absence of proof that the alteration was made after the last codicil, the legacy should have been admitted. The item containing it was not stricken out or obliterated. A single word was erased and another substituted by the testatrix, and the item as thus altered was adjudged to be a constituent part of her will. The clauses that were erased, and thus practically cancelled or stricken out of the will, were to be regarded in a very different light. They formed no part of the testamentary paper as probated, and were to be treated as though they had never been there. In the distribution of the estate, the will was before the court for construction, and as a guide in determining who

were entitled to participate in the fund; but the question of its due execution, in whole or in part, did not properly arise in that proceeding. That matter had been adjudicated, and no appeal had been taken. We are of opinion, that the legacy of \$300 in question, should have been admitted to participation in the distribution.

Decree reversed and record remitted, with instructions to distribute the fund in accordance with the foregoing opinion. The costs of this appeal to be paid out of the fund for distribution.

See *Frear v. Williams*, 1 Am. Prob. R. 85.

SAMUEL vs. ESTATE OF THOMAS.

[51 Wisconsin, 549.]

WHAT FUNERAL EXPENSES CHARGEABLE.

Only such necessary expenses for the funeral of a deceased person, and the care of his estate, as cannot properly be postponed until an administrator shall be appointed, are chargeable against the estate.

In this case, no administrator having been appointed until five or six months after the death of T., the plaintiff, his sister, expended over \$300 for a tombstone and curbing for his grave, and for memorial cards. The administrator having declined to repay these sums without an order of the court: *Held*, that such order was properly refused.

The fact that the deceased was under legal guardianship as an insane person, and that after his death the guardian approved the expenditures, does not affect the rule.

APPEAL from the Circuit Court for Racine county.

Mrs. Samuel presented to the county court of said county a petition that she be allowed, out of the estate above named,

certain money expended by her for the purposes and under the circumstances hereinafter mentioned. The material facts alleged in the petition are as follows: In September, 1875, the deceased, John Thomas, was duly adjudged to be insane, and William W. Vaughn was duly appointed guardian of his person and estate, and thereafter acted as such guardian. Prior to his becoming insane, the relations between the deceased and Mrs. Samuel (who was his sister) had for many years been most intimate, and he was accustomed "to counsel with her and to rely upon her for advice, for comfort in sickness, and for aid and assistance in all positions in which he might be placed." Knowing these relations, the guardian availed himself largely of the aid of Mrs. Samuel in the care of the deceased, and in looking after his personal welfare. John Thomas died intestate in September, 1878, leaving surviving him, besides Mrs. Samuel, a brother and another sister, who are his only heirs-at-law. He left an estate valued at about \$11,000. In March, 1879, letters of administration on said estate were duly issued to one Richard P. Howell, who immediately qualified and entered upon the discharge of his duties as administrator. Intermediate the death of the intestate and the appointment of an administrator of his estate, Mrs. Samuel (at whose house he died, and who had provided for and paid his other burial expenses, about which there is no controversy) procured a tombstone and curbing for his grave, and paid therefor \$500. This was in January, 1879. She previously paid for photographs of her brother, for memorial cards, and "for publication of probate notice," \$14 75. She incurred and paid these expenses with the knowledge and approval of Mr. Vaughn, and under his promise that the amount thereof should be repaid to her out of the estate of her brother. The administrator, when informed of the facts, approved the expenditures, but has since refused and now refuses to repay the same to Mrs. Samuel unless the court orders him to do so.

The administrator's demurrer to the petition (as not stating facts entitling the petitioner to the relief asked, and for lack of jurisdiction in the court to adjudicate upon the alleged cause of action) was sustained; and this decision was affirmed,

on appeal, by the Circuit Court. From the order of the Circuit Court Mrs. Samuel appealed to this court.

Henry T. Fuller and Wm. P. Lynde, for the appellant.

Fish & Dodge, for the respondent.

LYON, J. It may be conceded that the tombstone and curbing which the appellant procured for the grave of her deceased brother were appropriate to his estate and condition in life; that the expenditures therefor may be regarded as burial expenses; and that, had the administrator made such expenditures, the court might, in its discretion, have allowed the amount thereof against the estate. But it does not necessarily follow from these propositions, that the claim of the appellant is valid and enforceable against the estate of the intestate. The question to be determined is, What expenses incurred intermediate the death of an intestate and the granting of letters of administration are legally chargeable to the estate? The answer is, we think, that only such necessary expenditures as from the nature of the circumstances cannot properly be postponed until an administrator shall be appointed, are so chargeable. This rule will, of course, entitle an heir, a legatee, widow, or guardian, or even a stranger, who has paid reasonable burial expenses, necessarily incurred before administration could be granted, to be reimbursed from the estate. But, as we understand the law, the rule goes no further. Every expenditure which can decently and reasonably be postponed until an administrator is appointed, should be so postponed, and one who, before such appointment, voluntarily incurs an expense for which there is no immediate necessity, does so in his own wrong, and cannot compel the administrator, when appointed, to reimburse him.

The common law imposed severe liabilities upon one who, without authority, assumed to act as an executor. It always has been the policy of the law to prevent any unauthorized and unnecessary interference with the estates of deceased persons, and to confide the settlement of such estates to the le-

gally appointed and qualified executors or administrators, acting under the scrutiny and control of the proper courts. Certainly, there was no necessity for Mrs. Samuel to expend \$500 upon her brother's grave before letters of administration issued to Mr. Howell. A delay of a few months would have been no disrespect to the memory of the dead, and could furnish no just ground of complaint to his dearest friend. Besides, had the court allowed the administrator to erect so expensive a memorial, it would have seen to it that the brother and the other sister of the deceased should be consulted, and their wishes in regard thereto considered. It does not appear that Mrs. Samuel conferred with them on the subject. It is scarcely necessary to add that the action of Mr. Vaughn in the matter adds no weight to the claim. After the death of his ward, he was as powerless as Mrs. Samuel to charge the estate with an expense for which there was no immediate or pressing necessity; and had he incurred the expenditure, he would have been in no better or different position. Hence his advice, or consent or promise that the expense should be paid out of the estate, does not bind the estate.

The same rule excludes the right of the appellant to be allowed the cost of the photograph and memorial cards. As to the sum paid for "publication of probate notice," there is no averment in the petition showing the nature of the notice, or any necessity for the expenditure. The administrator refused to pay the claim of Mrs. Samuel, and in sustaining the demurrer to the petition the county court held that it was not a legal charge against the estate. We are not aware of any rule of law which was violated by that decision. Neither has our attention been called to any case which holds that a person may, before an administrator is appointed, voluntarily incur expenses like those incurred by the appellant, and charge the estate therewith. In most of the cases cited by the learned counsel for the appellant, the expenditures made by the executors or administrators, and not by third persons before administration granted. The view we have taken of the law of this case is fully sustained in *Foley v. Bushwary*, 71 Ill. 386; and

the doctrine of other cases cited on behalf of the respondent is in the same direction.

Order of the Circuit Court affirmed.

What are properly allowable as funeral expenses.—Only the necessary expenses of the funeral and such outlay for the preservation of the estate as cannot properly or prudently be postponed until an administrator is appointed, are chargeable against the estate. *Rappelyea v. Russell*, 1 Daly (N. Y.), 214.

Necessaries for family use, bought a few hours *before* the death of the testator, and when he was *in extremis*, are recoverable against the estate. *Sterling v. Potts*, 2 South. (N. J.) 773; and articles purchased at a store *after* the death of the testatrix, on the same day of her death, by members of the family, and entered in the pass-book in the usual way in which the testatrix had been accustomed to make her purchases in her lifetime, the articles so bought and charged being used at the funeral, and being suitable to the condition in life of the testatrix, are a charge against the administrator, and judgment for the purchase price may be had *de bonis testatoris*. *Campfield v. Ely*, 18 N. J. Law, 150.

But, *contra*, funeral expenses are in New York held to be a personal charge against the administrator, and not a liability of the estate. *Ferrin v. Myrick*, 41 N. Y. 815.

If funeral expenses are excessive, or the charges exorbitant, they will not be allowed. *McKenna's Estate*, 1 (Penn.) Leg. Gaz. Rep. 12.

The law implies a promise on the part of an administrator to reimburse one who has paid the funeral expenses of the intestate, and, in the absence of proof that such expenses were unreasonable in amount, they are properly charged in the administrator's account. *Patterson v. Patterson*, 59 N. Y. 574; *Re Miller*, 4 Redf. 302.

A defendant may set off his claim for funeral expenses against an action by the administrator for a debt due the intestate. *Adams v. Butta*, 16 Pick. 343; citing *Hapgood v. Houghton*, 10 Id. 154.

An executor who has paid funeral expenses of his testator, for the discharge of which there is no personal estate, is entitled in equity to be reimbursed therefor out of the real estate. *Clayton v. Somers*, 27 N. J. Eq. 230.

An executor named in an unprobated will is executor until that paper is pronounced invalid by the county court, and he has the right to create accounts for funeral expenses, or for the preservation of the estate. *Gilbert v. Bartlett*, 9 Bush (Ky.), 54.

The value of a suit of clothes in which to bury the deceased will, in the absence of testimony showing its impropriety, be allowed as a funeral expense. *Steger v. Frizzell*, 2 Tenn. Ch. 369.

In Louisiana, the amount allowed for funeral expenses cannot, where the estate is insolvent, exceed \$200. *Succession of Hearing*, 28 La. Ann. 149.

Where the widow of an intestate made a contract for a monument for

her husband, the price to be paid out of the estate, it was held not to be a claim enforceable against the administrator. *Foley v. Bushway*, 71 Illinois, 336; *Walker v. Brown*, 28 Id. 378.

See *Shaeffer v. Id. infra*.

SHERMAN, TRUSTEE vs. PAGE, EXECUTOR.

[85 New York, 123.].

LIABILITY OF EXECUTOR FOR PROPERTY IN ANOTHER JURISDICTION.

Testatrix died in this State owning property here and in Michigan. She gave legacies to individuals in each State and appointed two persons from each State executors as to the property within the State of their residence. Each set of executors qualified and took possession of the assets within their respective jurisdictions. *Held*, that the executors in this State took no title to the property in Michigan and should not include the same in their inventory, nor were they accountable therefor.

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made April 6, 1880, affirming a decree of the surrogate of the county of Wyoming on settlement of the accounts of defendant as executor of the will of Sarah E. Little, deceased.

The material facts are set forth in the opinion.

H. L. Comstock, for the appellants.

L. H. Hayward, for the respondents.

EARL, J. In December, 1872, Sarah E. Little died in Wyoming county, leaving a last will and testament by which she bequeathed legacies to certain persons residing in this State, and also to certain persons residing in the State of Michigan and elsewhere; and she appointed Henry N. Page, a resident of this State, executor for carrying out the provisions of the will

"so far as they relate to parties and property in this State," and Charles W. Grant, of East Saginaw, and D. H. Jerome, of Saginaw City, Michigan, executors "for everything so far as they relate to parties and property in the State of Michigan and elsewhere;" and she directed her New York legatees to be first paid. In the month of January, 1873, the will was proved and admitted to probate in the Surrogate's Court of Wyoming county, and letters testamentary thereon were issued to Page, and to no one else. On the 17th day of February, thereafter, the will was admitted to probate in the Probate Court of Saginaw, in the State of Michigan, on an exemplified copy of the will and probate thereof from this State, and letters testamentary were thereon issued to Grant and Jerome.

At the time of the death of the testatrix, she left certain personal property in this State, and also in the State of Michigan. Page took possession of the personal property within this State and filed an inventory thereof, and Grant and Jerome took possession of the personal property in the State of Michigan, and no part of that property has since come into this State.

On the 6th of August, 1877, Page filed a petition with the surrogate of Wyoming county, praying for the final settlement of his accounts, and in the account rendered by him he accounted for all the property inventoried and which came into his hands as executor; and the account showed that after paying debts, expenses and other matters, there remained nothing in the hands of Page for the payment of legacies, and the surrogate made a decree settling the accounts as presented.

Several of the New York legatees, now appellants, appeared upon the accounting and filed objections to the account, claiming that Page, as executor, should be charged with the assets left by the testatrix in Michigan, or that he should be required to commence and prosecute the necessary legal proceedings in Michigan to compel the Michigan executors to pay and deliver to him the Michigan assets, or so much thereof as would be sufficient to pay the New York legatees.

It was admitted upon the accounting that the testatrix left sufficient assets in the State of Michigan to pay all the debts

of the testatrix in that State, and to pay the legatees residing in this State; that Page had applied to the Michigan executors to surrender to him some of the Michigan assets, but they claimed the control of those assets, and refused to surrender the same, or any part thereof, to him; but that he had not resorted to any legal proceedings against them.

The appellants in their petition of appeal allege that the decree of the surrogate was erroneous, in that it did not charge Page with the Michigan assets, or require him to institute legal proceedings against the Michigan executors for the recovery of such assets.

There can be no doubt that the testatrix had the right to name Page executor for this State, and Grant and Jerome executors for the State of Michigan (3 Redfield on Wills, 53-72; Williams on Executors, 217; *Despard v. Churchill*, 53 N. Y. 192; *Bartnett v. Wandell*, 60 Id. 350), and to confine them in the discharge of their duties to the States for which they were appointed. By virtue of the will, Page took title to the assets in this State, and the Michigan executors to the assets in that State. They have the same right to possess and control the assets there that he has to possess and control the assets here. He has no more right to interfere with their possession than they have with his. They are not responsible for the New York assets, and he is not responsible for the Michigan assets. The administration in the State of Michigan is in no proper sense ancillary or auxiliary to the administration here. The executors in both States derive their title from the will and not from the letters issued to them. Even if they had all been joint executors, residing in this State, upon the facts now appearing, Page could not have been charged with, or made responsible for the assets which came into the hands of Grant and Jerome, and he could not have compelled the surrender of such assets into his hands. (*Burt v. Burt*, 41 N. Y. 46; *Adair v. Brimmer*, 74 Id. 539.) He did not consent, actively, that those assets should go into their hands. They were never under his control. He demanded that they should be delivered to him, and failed to get them. Under

such circumstances there is no authority for holding him responsible for them.

The case of *Schultz v. Pulver* (11 Wend. 363), holds that an administrator in this State is bound to include in his inventory all the assets of his intestate which came to his knowledge, whether situate in this State or out of it; and that he is bound to take reasonable measures for the collection of a demand due the estate he represents from a debtor residing out of the State. But that was a case where there was no administration out of the State, and is not applicable to a case where executors under the will had been named for the foreign assets. In the *Matter of the Estate of Butler* (38 N. Y. 397), it was held that the executor of a deceased resident of this State, to whom letters testamentary here have been issued, can be required to include in his inventory assets belonging to the testator which are situated in another State. In that case it did not appear that any administrator or executor had been appointed in the foreign State.

It is impossible, therefore, to hold that Page should be charged with the Michigan assets which have not come into his hands, and which are in the hands of the very person appointed by the testatrix to take them. Assuming that the surrogate had the power, under the provisions of the Revised Statutes (2 R. S. 220), empowering surrogates to direct and control the conduct of executors and administrators, to direct Page to institute legal proceedings for the recovery of the Michigan assets, he was not bound to exercise such power. It rested in his discretion whether he would compel Page, under all the circumstances of this case, to institute such proceedings, and that discretion is not subject to review in this court.

It cannot be doubted that the New York legatees can enforce any claims they have upon the Michigan assets in the legal tribunals of that State, and that they can obtain payment of their legacies there, or by compelling a transfer of sufficient assets for that purpose to the New York executor; and if they need, in the legal proceedings instituted in Michigan, the use of the name of the New York executor, they can probably obtain permission to use it, by indemnifying him against harm

from such use. If he should refuse such permission upon application and indemnity, the surrogate could probably compel it.

It follows from these views that the judgment should be affirmed.

All concur.

Judgment affirmed.

See Price v. Mace, 1 Am. Prob. R. 78.

BOWKER, TRUSTEE vs. PIERCE.

[130 Massachusetts, 262.]

EFFECT OF AGREEMENT AS TO TRUSTEES' COMPENSATION.— INVESTMENTS IN STOCK.

An agreement made by a trustee with his *cestui que trust*, in regard to the amount of compensation he shall receive for his care of the trust property, is not invalid, if the *cestui que trust* is *sui juris*, and competent to act, and no fraud is practiced or undue advantage taken; and such agreement should be taken into consideration by the Probate Court in determining the amount the trustee is entitled to charge.

A trustee under a will, who, in good faith and in the exercise of a sound discretion, decides to retain an investment made by the testator in stock of a railroad corporation, when it is gradually falling in value in the market, is not responsible for the depreciation, although the stock becomes worthless.

APPEAL from a decree of the Probate Court, allowing the third account of the appellee, as trustee of certain property given by the will of Daniel Stoddard for the benefit of the daughters of the testator. Hearing before Colt, J., who was of opinion that the decree should be affirmed, but, at the request of the appellants, reported the case for the consideration

of the full court; such decree to be entered as law and justice might require. The facts appear in the opinion.

A. C. Goodell, Jr., for the appellants.

C. Sewall, for the appellee.

MORTON, J. One of the appellants, Martha A. Pierce, filed as one of her reasons of appeal that the amounts charged by the trustee for his compensation are excessive. It appeared at the hearing that the appellant and her sister Elizabeth, the other *cestui que trust*, had great confidence in the appellee and a strong preference for him as trustee, and Elizabeth agreed, in consideration of his assuming the trust, that he should receive for his services three hundred dollars a year, and the appellant ratified this agreement.

Such an agreement with *cestuis que trust*, who are *sui juris* and competent to act, is not invalid, if made without fraud or any undue advantage taken of them, and may and should be considered by the court in determining the compensation which the trustee is entitled to charge. In this case the amounts charged as compensation by the trustee are much less than the agreement contemplated: they are clearly not exorbitant or unconscionable, and we are of opinion that, under these circumstances, the appellant cannot object to them and that they should be allowed. We need not, therefore, consider whether, under the Statute of 1877, c. 199, § 3, the appellant can be permitted to re-open the former accounts of the trustee, to any, and if any, to what extent.

The other reason of appeal filed by all of the appellants raises the question whether the trustee should be charged with the depreciation in value of twenty-nine shares of the capital stock of the Eastern Railroad Company, which at the time of his appointment was a part of the trust estate. In the leading case of *Harvard College v. Amory*, 9 Pick. 446, the rule in this commonwealth was held to be that "all that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe

how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." This rule has been re-affirmed by numerous decisions since. *Brown v. French*, 125 Mass. 410, and cases cited.

In the case before us, it appeared that the shares of the Eastern Railroad Company were purchased by the testator before his death, and when they came into the hands of the trustee were appraised at par. The railroad company met with reverses so that it paid no dividends after July, 1873, and the value of its stock gradually decreased until it became nearly worthless, and the appellant Martha A. Pierce and her husband, before and after September, 1874, requested the trustee to sell the stock and to convert the same into more profitable securities, but he declined to do so, upon the ground that in his judgment it would be a great sacrifice to sell at that time.

In determining whether he would sell this stock, all that was required of the trustee was that he should act with good faith and in the exercise of a sound discretion. It is not contended by the appellants that he acted in bad faith. It seems to us from the evidence reported that he acted throughout with an anxious desire to do what was for the best interests of the *cestuis que trust*. He was placed in unexpected and embarrassing circumstances. The railroad company, which had been considered strong and safe, met with reverses, became embarrassed, and its stock was gradually falling in the market. It appeared in evidence that he made inquiries and investigations, and was informed that the directors had made a statement that the road was in good order and that they saw no reason why a dividend could not be paid in January, 1876, and was also informed that one of the directors, and the treasurer, had advised their friends to buy the stock, and had said it was a good investment at sixty dollars per share. We can now see that it would have been wiser to sell the stock. But in judging his acts we should put ourselves in his position at the time. He was considering the question, not whether he should invest in this stock, but whether he should sell the stock bought by

the testator, upon a falling market. The evidence shows that he in good faith made investigations, sought information from trustworthy sources, and acted upon such information according to his best judgment. We are of opinion that the presiding justice who heard the case rightly found that, under the circumstances, the trustee acted in good faith and with the sound discretion which the law required of him.

Decree affirmed.

On the duty of trustees to make investments, and what security should be taken, see *Gilbert v. Welsch, infra*, and cases in note; *Spaulding v. Wakefield's Estate, ante*, p. 14; *Ormiston v. Olcott, infra*; *Ward v. Kitchen*, 1 Am. Prob. R. 855; *Troup v. Rice*, 1 Id. 18.

BAINBRIDGE'S APPEAL.

[97 Penn. St. 482.]

DISCRETION OF EXECUTOR IN ERECTING MONUMENT.

A testator directed his executor to sell all his property and to pay the interest thereof to his mother during her life; after her death he bequeathed certain legacies, and all the residue of his property he directed his executor "to appropriate and use for and in the erection and construction of a suitable monument at my grave, such as the amount of funds in his hands will warrant." *Held*, that testator's mother having died and his legacies being paid, his executor had a right to apply all or any part of the testator's estate remaining in his hands, which he saw proper, to the erection of a monument at the grave.

APPEAL from the Orphans Court of Montgomery county.

This was an appeal by Henry Bainbridge from the decree of the said court making distribution of the estate of William M. Bainbridge, deceased. The facts of the case were as follows: William M. Bainbridge, an unmarried man, died at his residence, in Norristown, Montgomery county, June 11th,

1869, leaving to survive him three brothers (of whom the appellant is one) and three sisters, having made his last will, dated June 1st, 1869, wherein he directed that all his estate, real and personal, should be sold by his executor, the interest of the proceeds to be paid half yearly to his mother during her life, and after her death he directed as follows, viz. :

"I give and bequeath to Norristown Encampment No. 37, of the Independent Order of Odd Fellows, the sum of one hundred dollars.

"I give and bequeath to Curtis Lodge No. 239, of the Independent Order of Odd Fellows, the sum of one hundred dollars.

"I give and bequeath to my nephew, William Tustin, the sum of twenty-five dollars.

"I give and bequeath to my nephew, William Fulmer, the sum of twenty-five dollars.

"And all the rest, residue and remainder of my estate, after the decease of my said mother, and the payment of said bequests, I direct my said executor to appropriate and use for and in the erection and construction of a suitable monument at my grave, such as the amount of funds in his hands will warrant.

"I wish and desire to be buried in Montgomery Cemetery, and that Curtis Lodge, of the Independent Order of Odd Fellows, shall have the charge and management of my funeral, and have my remains interred in their burial lot, or in some burial lot, to be purchased near thereto.

"I hereby nominate, constitute and appoint my friend, George W. Calhoun, of Norristown, to be executor of this, my last will and testament.

"In witness whereof," &c.

The testator's mother died in April, 1880, and shortly afterwards the testator's executor filed his account, showing a balance for distribution of \$1,118 48. The only disputed question before the auditor, to whom the account was referred, was as to the distribution of the residue of the testator's estate after payment of the pecuniary legacies.

The auditor awarded \$300 to be a suitable sum for a monument and decreed distribution of the balance.

Exceptions to the auditor's report were filed by both the heirs and the executor, upon the argument of which a draft of a monument as proposed by the executor, the cost of which was estimated at \$715, was submitted to the court and attached to the report.

The court awarded the sum of \$715 to the executor for the erection of the monument.

Henry Bainbridge, one of the brothers of the testator, took this appeal, assigning for error the interpretation by the court of the will of the testator, and the decree of \$715 to the executor for monumental purposes.

George W. Rogers, for the appellant.

Theodore W. Bean, for the appellee.

MERCUR, J. This contention arises under the will of one who died unmarried and without issue. He appears to have thought he had a right to make such a disposition of his estate as he saw proper, provided he did not violate any principle of public policy, religion, or morality, nor infringe on any statute. Whether he knew Blackstone had defined a will to be "the legal declaration of a man's intention which he wills to be performed after his death," we are not informed. Nevertheless he did execute a last will and testament, in due form of law. After the payment of his debts and funeral expenses, he directed that all his estate be converted into money, and invested in good first mortgage security, the interest thereof to be paid half yearly to his mother during her natural life. After her death he bequeathed one hundred dollars to Norristown Encampment No. 37, of the Independent Order of Odd Fellows, and a like sum to Curtis Lodge No. 239, of the same order. Also the sum of twenty-five dollars to each of two of his nephews named. Then "all the rest, residue, and remainder of my estate, after the decease of my said mother, and the payment of said bequests, I direct my said executor to appropriate and use for and in the erection and construction of a suitable monument at my grave, such as the amount of funds in his hands will warrant."

In the exercise of this power, the executor selected a monument which cost seven hundred and fifteen dollars, being about ninety dollars less than the residuary estate. The court sustained him in so doing. This presents the ground of complaint. It is contended the language of the will does not justify the expenditure of so large a sum. It is claimed to be more than "the amount of funds in his hands will warrant." This is an attempt to give undue weight to that clause and make it paramount to the previous clause appropriating the whole fund. It should be construed in connection with, and subordinate to, the former clause. He had therein directed his executor to appropriate and use "all the rest, residue and remainder" of his estate for the purpose named. The whole fund was "in his hands" for that purpose. The last clause was not intended to take from him the right to so use the whole fund. The word "suitable" manifestly related to the form and style of the monument, which was left to the discretion of the executor, with the cautionary direction to have due regard to the amount of the funds. There is absolutely nothing indicating he may not use the whole fund. There is no devise over of any part thereof. The reason therefor evidently is that he expected all of it would be expended for the specific purpose named. Why then shall not due effect be given to an intention so clearly expressed? May not the testator have said to the appellant as the good man of the house said to the laborer, "is it not lawful for me to do what I will with mine own?"

We will not consider the wisdom or the folly of this disposition. He had a right to make it. He did make it, according to the forms of law. He gave the fund and clearly expressed his intention as to its use. We see no cause to set at naught his will or to impair its force. The executor made his election under it. The court confirmed his action. The appellant has no just ground of complaint.

Decree affirmed, and appeal dismissed, at the costs of the appellant.

SHARSWOOD, C. J., dissented.

ANDERSON *vs.* IRWIN.

[101 Illinois, 411.]

EVIDENCE REQUISITE TO ESTABLISH WILL DESTROYED.

Where a will is destroyed with the connivance of some of the heirs, an innocent party in establishing the same is not required to prove the exact language in which it was written, but may show in general terms the disposition made by the testator of his property—that it purported to be his will and was duly attested.

F. G. Cockrell, and *J. C. Allen*, for the plaintiffs in error.

Hagle & Finch, for the defendants in error.

MULKEY, J. Joseph Anderson died on the 28th of May, 1879, leaving Patsy Anderson, his widow, since deceased, and William, John, Thomas, Joseph, and George Anderson, and Rebecca J. Irwin, his children, and William P. McKee, a grandson, his only heirs at law. At the time of his death he left an instrument purporting to be his last will and testament. It was found among his effects, sealed up in an envelope, indorsed "Joseph Anderson's Will." A short time after his death a meeting was appointed at William's for opening and examining the will, to which all the heirs were invited but the daughter and grandson. William, John and Thomas were present at the meeting. None of the other heirs attended. The instrument was opened and read by Robert Walker, who was subsequently appointed administrator of the estate, in the presence and hearing of the widow and three attending heirs. It purported to be the will of the deceased, and was witnessed by George D. Ramsey and S. S. Clark. By the provisions of the will the testator gave his entire estate to his wife for life, and divided the remainder, after charging John with \$475, with interest at ten per cent. per annum from 1856, and William with \$400, with like interest from 1866, equally among the heirs. This meeting occurred on the 5th of June, 1879. At the conclusion of it, Thomas, who was named as executor, took possession of the will and kept it till the 13th, when he returned it to Wil-

liam. On the 22d of the same month, Thomas went to see his mother, then at William's, and told her he could not probate the will on account of ill health, when she informed him she intended to burn it. He thereupon told her if she was determined to burn it, to call some one besides the family. She then started off towards the fire, and afterwards told him she had burned it. Under this state of facts the daughter, Mrs. Irwin, filed the present bill, by which she seeks to establish the instrument in question as the will of her father, and to have the estate of the testator distributed according to its provisions.

The Circuit Court of Clay county found the equities with the complainant, and entered a decree in conformity with the prayer of the bill. From that decree Thomas, John and William alone appealed to the Appellate Court for the Fourth District, where said decree was affirmed, and we are now asked to review the judgment of that court.

The objection urged to the decree in this case is, that the evidence fails to show that the alleged will was in fact the will of the testator, or that it was executed in conformity with the statute, and also that the contents of the will are not sufficiently proven. The law is intended to be practical in its application to the varied transactions and circumstances which go to make up the affairs of life, and which are constantly giving rise to legal controversies that have to be settled in courts of justice. Indeed, most of the rules of evidence have been established with direct reference to this principle. Thus, it is a familiar rule that no evidence will be received of a fact which, from its very nature, shows there is better evidence of such fact, without first satisfactorily accounting for the absence of the higher order of evidence,—or, more briefly, the law requires in proof of a fact the best attainable evidence. The counterpart of this rule is, the law is always satisfied where the fact sought to be established has been proven by the best evidence of which, in its nature, it is susceptible. The latter rule we regard as important in its application to the circumstances of this case. The instrument in controversy having been destroyed without the fault of the defendant in error, and with

the connivance of a part, if not all, of plaintiffs in error who interposed any defense in the court below, and there not appearing to be any copy of it in existence, it would be equivalent to denying the complainant relief altogether to require her to prove the very terms in which it was conceived. All that could reasonably be required of her under such circumstances, would be to show in general terms the disposition which the testator made of his property by the instrument,—that it purported to be his will, and was duly attested by the requisite number of witnesses. This was all fully and clearly shown.

It is worthy of note that the bill is confessed as to all of the defendants who were not present at the meeting at William's, when the will was read by Walker, and that of those present at that meeting, Thomas, John and William alone appealed to the Appellate Court, and are the only ones prosecuting this writ of error. It is only necessary, therefore, to consider this case in its relation to them. Viewing it thus, it is difficult, in the light of all the circumstances before us, to repress the conviction that if they did not actually conspire with the mother to destroy the will, they at least connived at it. Their denial under oath, in their answers, of all *personal* knowledge of the will, in the light of the subsequently admitted fact that they were present and saw it taken from the envelope and heard its contents read, is so manifestly a mere play upon words at the expense of the real truth, that they stand in anything but an enviable light before the court. In view of all the facts, we think the maxim, *omnia præsumentur contra spoliatores* may properly be applied to this case. In applying this maxim, the rule seems to be well settled that where one deliberately destroys, or purposely induces another to destroy, a written instrument of any kind, and the contents of such instrument subsequently become a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded thereon. In such case slight evidence will suffice. Broom's Legal Maxims, 576.

As to the objection there is no proof of the sanity of the testator, it is sufficient to say that in the absence of anything

tending to show he was not of sound mind, we think, under the circumstances of this case, the dispositions of the will itself afford sufficient evidence of the testator's sanity.

Upon the whole, we are fully satisfied with the decree in the case, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

As to proof of lost and spoliated wills, see *Foster's Appeal*, 1 Am. Prob. R. 435.

HAMMOND vs. HAMMOND.

[55 Maryland, 575.]

**BEQUEST ON CONDITION SUBSEQUENT.—EXTRINSIC EVIDENCE.—
FROM WHAT DATE WILL SPEAKS.**

Testator bequeathed a sum of money to his brother H. "for that he the said H. shall look after and take care of our beloved brother R. while he shall live, and bury him at his death." R. died before the testator. *Held*,

That the bequest to H. was upon condition subsequent and its performance becoming impossible by the act of God he took unconditionally.

Extrinsic evidence of the facts and circumstances respecting persons or property to which the will relates are admissible to explain the meaning and application of testator's words.

A will speaks from the death of the testator and not from its date unless by a fair construction its language indicates the contrary intention.

THE facts are stated in the opinion of the court.

Charles Marshall, for the appellants.

Sebastian Brown, for the appellee.

BOWIE, J. The appellants filed their bill of complaint in the Circuit Court of Baltimore city against the appellees, for

the purpose of ascertaining and establishing the true construction of the will of William B. Hammond, late of said city, deceased. They allege that the testator died on or about the 23d day of May, 1877, leaving a last will, which has been duly admitted to probate in the Orphans Court of Baltimore city, and Charles Lewis Hammond (one of the appellees), executor named therein, has duly qualified as executor, and obtained letters testamentary thereon.

It is further charged, that by one of the clauses of the will, the testator bequeathed to his brother, the said Charles Lewis Hammond, "the sum of twenty-five hundred dollars, secured by a mortgage from William Huddleson of Montgomery county, for that he the said C. Lewis Hammond, shall look after and take care of our beloved brother Rezin, while he shall live, and bury him at his death."

They allege, "that the brother Rezin mentioned in said clause, died before the testator, and they are advised, and claim that by the true construction of the above recited clause of said will, which was intended to make provision for said Rezin, the sum of twenty-five hundred dollars is not bequeathed in trust for said Rezin, but that it is a certain sum left to the said Charles Lewis Hammond, as the consideration of the assumption by him of the care of said Rezin while living, and burying him when dead; and that the said C. Lewis Hammond, would not be entitled to said legacy, unless he should, after the death of the testator assume said duties, and in case he should accept said legacy, his obligation to perform said offices in favor of said Rezin, would be entirely independent of the amount of said bequest, and would be co-extensive with the life of said Rezin, without reference to the amount that might have to be expended in discharging said offices."

The complainants claim, therefore, that by the death of said Rezin, before the testator, the said C. Lewis Hammond was prevented from performing the condition on which he was to have said legacy, and is no more entitled to the same than he would have been had said Rezin survived the testator, and the said C. Lewis Hammond refused to assume the performance of the duties towards said Rezin, mentioned in said will.

It is further charged that Charles Lewis Hammond has collected the money mentioned in said above cited clause of the will, and refuses to distribute the same among the persons entitled thereto, although all the debts of the estate have been paid, and more than a year elapsed since the granting of the letters testamentary. That although there is no general residuary clause in the will, there is a special residuary clause which includes all *choses in action*, and they are advised that by failure of the above bequest, the said sum of \$2,500 passed to the persons named in said residuary clause, viz., the complainants, brothers and sisters of the testator.

The bill prays that the construction of the will set forth therein, may be declared the true construction, and the executor required to charge himself accordingly with the \$2,500 and interest, and pay over to the complainants their respective shares.

A copy of the will, duly authenticated, is filed with the bill, marked Exhibit A.

The answer of Charles Lewis Hammond, in his own right, and as executor, was filed, admitting

1st. The execution of the will, the death of William B. Hammond, the granting of letters testamentary to him, the respondent, and the collection of the money.

2d. That the will contains the clause specifically set forth in the bill of complaint, but denies that the true intent and meaning of the language of said clause is set forth in the bill.

Further answering, the respondent says, "that at the time the testator was preparing to have said will written, he asked the respondent, for what sum of money he would agree to look after and take care of Rezin Hammond as long as the said Rezin should live, and bury him at his death, and the respondent in answer thereto, and in the presence of witnesses, agreed to perform said services for such sum of money as the said William B. Hammond would devise to the respondent for that purpose. That at the time of this conversation the said Rezin Hammond was sick and very feeble, all of which was well-known to the said William B. Hammond, and it was also known to said deceased, that this respondent was a poor man

with a large family of young children upon his hands, and he knew at the time of making said will, that the said Rezin was at the house of the respondent confined to his bed. And the respondent further says, he knew of the devise to him of said \$2,500 mentioned in the bill and of the conditions connected therewith, and that under and by virtue of said devise he looked after and took care of the said Rezin Hammond as long as he lived, and buried him at his death, and that he did agree with the said William B. Hammond to look after and take care of the said Rezin, and bury him at his death in consideration of said devise, and if said devise had not been made he was not able to, and could not have maintained said Rezin."

The respondent further contends that the testator survived the said Rezin, and although he was in possession of his faculties and had ample opportunity to revoke said bequest, never did so, and never contemplated it, and it was not in his power to make a valid revocation of said bequest.

That apart from the agreement aforesaid, the devise took effect at the time of the execution of the will, and the respondent was to receive the sum of \$2,500 irrespective of the time said Rezin Hammond should die, provided the respondent from the execution of said will should look after, take care of and bury said Rezin, which he avers he did. These citations from the bill and answer foreshadow and present substantially the conflicting views of the appellants and appellees, which are set out more in detail in the briefs, and arguments of the counsel for the respective parties.

The appellants contend that the will is to be construed as speaking from the death of the testator, and that as the bequest was given in consideration that he should take care of Rezin Hammond and bury him when he died, "it follows, that on the death of Rezin before the testator, the bequest fails."

The appellee's theory is, that the will is to be taken as speaking from the date of its execution, although it does not operate until the testator's death; and if construed, as speaking from the death of the testator, then the condition being a

condition subsequent and becoming impossible, the bequest vested unconditionally in the legatee.

A commission was issued and returned, under which the testimony of the draughtsman of the will and other witnesses as to the declarations of the testator, prior to and at the time of the execution of the will, were taken.

To all of which testimony the appellants excepted, on the ground of irrelevancy.

In order to discover the intention of the testator, it is the duty of the court to put themselves in the place of the testator, and then see how the terms of the will affect the property or the subject-matter. 1 *Greenleaf's Evid.* part II, sec. 287.

In the 5th proposition of Vice-Chancellor Wigram's rules of interpretation of wills, it is said "for the purpose of determining the object of the testator's bounty, or the subject of disposition or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will." 1 *Greenleaf's Evid.* Id. note 1.

Lord Abinger's opinion in the case of *Hiscocks v. Hiscocks*, 5 M. & W. 363, 367, incorporated by Greenleaf in his chapter on the admissibility of parol evidence, as the most luminous exposition and exhaustive essay on the subject, states that "all the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence to enable us to understand the meaning and application of his words." 1 *Greenleaf*, sec. 289.

The same doctrine is announced by this court in the case of *Hawman & Wife v. Thomas, Ex'r*, 44 Md. 43, where it is said: "The only object and purpose for which such proof can be properly admitted, is, not to show what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words." See *Walston's Lessee v. White*, 5 Md. 297. To the same effect is the language of Shaw, C. J., in *Tucker v. Seaman's Aid Society*, 7 Metcalf, 205. "Extrinsic evidence is admissible only when the will is plain and clear upon its face, and becomes doubtful when applied to the subject-matter." *Allen's Ex'rs v. Allen*, 18 Howard, 393.

The doubt in this case arises not from any obscurity or ambiguity on the face of the will, but from the contest as to the rules of construction to be applied, and the class of conditional bequests to which it belongs, whether precedent or subsequent.

The rule of interpretation, as to the period of time from which the will speaks, both in this State and in England varied formerly, with the subject-matter to which it applied. As to real estate, it was supposed to speak (or operate) only on such lands, &c., as the testator held at the date or execution of the will, but as to personalty, it operated upon all he owned at the time of his death. Although, generally, as testamentary instruments they were construed as speaking from the time and event by which they became consummated, the death of the testator, there was no invariable rule, except as determined by the species of property bequeathed or devised. Thus Jarman, speaking of wills generally, says, "for some purposes a will is considered to speak from its date or execution, and for others from the death of the testator, the former being the period of its inception, and the latter, that of the consummation of the instrument." 1 *Jarman*, 292 (3d Amer. ed.).

In the summary of his rules for construction, it is said, "that a will speaks, for some purposes, from the period of execution, and for others, from the death of the testator; but never operates until the latter period." *Rule IV*, 2 *Jarman*, p. 741 in *Mar.* (3d Amer. ed.). The general rule, however, as we have before intimated, is, "that a will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicates the contrary intention." *Canfield v. Bostwick*, 21 Conn. 550; *Gold v. Judson*, 21 Conn. 616.

Adopting the general rule of construction, we proceed to inquire whether the bequest under consideration comes within the class of legacies upon condition precedent, or legacies upon condition subsequent.

It was said by Willis, C. J., in *Acherley v. Vernon*, "that no words necessarily made a condition precedent, but the same words would make a condition either precedent or subsequent, according to the nature of the thing and the intent of the par-

ties." *Willes' Rep.* 153; *Gillett v. Wray*, 1 P. Wms. 384; *Harvey v. Aston*, 1 Atk. 361; 4 *Kent* (5th ed.), 124, 125; 7 *G. & J.* 240, *et al.*, cited in note 1; 1 *Jar. on Wills*, p. 798. The item of the will under consideration is a specific bequest for a particular purpose to be accomplished *in futuro*, without any disposition over, in case of non-performance. It closely resembles the case of *Thomas v. Howell*, 1 Salk. 170, where one devised to his eldest daughter on condition that she should marry his nephew on or before she attained twenty-one years. The nephew died young, and after his death, the devisee being then under twenty-one, married another.

It was held, that the condition was not broken, its performance having been impossible by the act of God. 1 *Jarman*, 808, *in Mar.*

Without multiplying examples, which are numerous, the condition annexed to this bequest is both in the collocation of its language and the order of events so clearly posterior to the vesting of the legacy, that we have no difficulty in declaring it a condition subsequent, and its performance impossible by the act of Providence, the legatee takes unconditionally.

Decree affirmed, with costs to the appellee.

See *Martin v. Martin*, *infra*; *Armstrong v. Armstrong*, 1 Am. Prob. R. 206; *McNeely v. McNeely*, 1 Id. 585.

MC CABE, ADMINISTRATOR *vs.* FOWLER, EXECUTOR.

[84 New York, 314.]

DEGREE OF CARE REQUIRED OF EXECUTOR IN KEEPING ESTATE SECURITIES.

An executor is not a guarantor of the safety of securities in his charge belonging to the estate; he is bound simply to exercise such prudence and diligence in the care and management of the estate as men of discretion and intelligence in general employ in their own like affairs.

An executor left government bonds in the custody of testator's nephew, who had been intrusted with them for safe keeping by deceased in his lifetime. No reason for any suspicion of the nephew's integrity or financial ability was shown until it was discovered that he had converted them to his own use. The executor died prior to the time of the conversion. *Held*, that the latter's estate was not chargeable with the loss.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of defendants, entered upon a decision of the court, on trial without a jury.

The nature of the action and the facts are set forth sufficiently in the opinion.

I. T. Williams, for appellant.

Calvin Frost, for respondent.

MILLER, J. The plaintiff in this action seeks relief against the estate of William Fowler, deceased, for the negligence of the testator as an executor of the estate of Nathaniel Fish, deceased, in failing to collect certain government bonds belonging to said Fish's estate. These bonds were left and deposited for safe keeping by Fish in his lifetime with one Odell, his nephew, who purchased the bonds for Fish and was at the time a man of responsibility, good character and business habits, and considered entirely trustworthy. Upon the death of Fish in 1865, Fowler qualified as executor of his will and assumed to act in that capacity. His widow, who was executrix, did not qualify,

or renounce during the life of Fowler, and the bonds deposited were converted in 1867 into five-twenty bonds, which remained in the hands of Odell, he transmitting the interest to Fowler, as he had previously done, until Fowler died in October, 1871, leaving a will. His executors called upon the surrogate for advice, and upon being informed that Mrs. Sarah Fish, the widow and surviving executrix named in the will of her husband, should qualify, according to the findings of the judge, an oath as executrix was prepared and, she being indisposed at the time, was sent to her residence, and she subscribed and swore to the same on the 18th of January, 1872, before a notary, which oath was filed in the office of the surrogate and a memorandum of the same entered in the blank book of oaths, where it should have appeared if it had been taken in the office. The letters testamentary were not issued to Mrs. Fish, but she acted as executrix and executed a power of attorney to one John B. Fowler, who took charge of the estate, collected and paid over the interest to her, she being under the will entitled to the income during her life, until Odell's death in 1875, and as residuary legatee to one-half of the principal. It then appeared that in 1874 the bonds were hypothecated by Odell as collateral security for a loan made by the firm of which he was a member, and the firm, including Odell, turning out to be irresponsible, the bonds were lost to the estate of Fish.

It will be observed that up to the time of the decease of William Fowler, so far as the evidence shows, there was no reason to suppose that the bonds in question were unsafe, or in any peril of being lost while in the possession of Odell. Nor do we think that there is any valid ground for claiming that Fowler was negligent, or failed to bestow upon the property committed to his charge that degree of care, attention and vigilance which was essential for its safety and preservation, and which he was bound to exercise as a lawful custodian of the same. He had acted the same as the testator, Mr. Fish, had done in leaving them with Odell, and as the proof shows, he had also left with Odell his own securities of a like nature.

An executor or trustee is not a guarantor for the safety of the securities which are committed to his charge, and does not

warrant such safety under any and all circumstances, and against all contingencies, accidents or misfortunes. The true rule which should govern his conduct is, that he is bound to employ such prudence and such diligence in the care and management of the estate or property as in general prudent men of discretion and intelligence employ in their own like affairs. (*King v. Talbot*, 40 N. Y. 76.) While this rule requires an executor or trustee to avoid all extraordinary risks in the investment of the moneys of the estate and to keep the same safely, it does not demand that he shall be made liable for contingencies which, under ordinary circumstances, could not have been anticipated. There is nothing in the record before us which evinces that the bonds in question were liable to be lost in Odell's custody, and, as the case stands, that they were not entirely safe up to the period of the death of William Fowler. At this time they had not in any way been misapplied or improperly used, and there is no ground for claiming that Odell was an improper person as a depositary of the bonds. Both Fish and Fowler had no reason to believe to the contrary, and Fowler, as executor, was only following the course pursued by Fish in leaving the bonds where he found them. He did the same with his own bonds, thus evincing his confidence in Odell and his entire good faith. It does not excuse him if negligent because Fish had acted in like manner; but in view of the circumstances it cannot, we think, be said that he did not act as a person of ordinary prudence and care would have done in regard to his own affairs, or that he was negligent. If Fowler, the executor of Fish, for any reason had cause for suspicion or doubt as to Odell's integrity or financial ability to respond for any loss or misappropriation, or if it had appeared that Fowler knew that Odell was in failing circumstances, a different question would arise, and it might well be urged that he had conducted himself without that caution and care which his duty as trustee demanded; but the facts presented lead to the conclusion that there was no just ground for apprehension of loss in consequence of Odell's delinquency or want of responsibility during Fowler's life, and there is no reason to doubt that the bonds were in existence and entirely safe and secure up to the

period of Fowler's death and for some years subsequent thereto. Such being the state of the case, the proof should be very clear showing neglect on the part of Fowler while he was alive, to hold his estate chargeable for the loss which occurred after his decease. His executors had no control over the bonds, no authority to interfere with the estate of Fish, and no right to the custody of or to receive or take charge of the bonds in any form. (2 R. S. 448, § 11; *Shook v. Shook*, 19 Barb. 653.) By Fowler's death they had passed from him as executor into the hands of Mrs. Fish, the surviving executrix or trustee, or to such person who might be appointed by the surrogate to administer upon the estate. The court found that Mrs. Fish qualified as executrix, and there is, we think, sufficient evidence to support this finding. And although no letters testamentary were issued to her, she assumed to act and took charge of the property belonging to the estate of her husband. That letters were not issued can make no difference so long as she was entitled to the same. She had authority as executrix and as a trustee under the will of her husband to take charge of the property belonging to the estate, and the subsequent issue of letters of administration to the plaintiff did not, if she was qualified, supersede her acts or in any way interfere with her rights. The subsequent appointment of the plaintiff is not important if Mrs. Fish duly qualified and acted as executrix, and cannot affect her acts so far as they relate to taking charge of the bonds in controversy. Nor does any question of estoppel, as to the right of the defendants to set up as a defense that Mrs. Fish was an executrix and acted as such, arise on this appeal.

Assuming, however, that Mrs. Fish was not authorized to act as surviving executrix under her husband's will, then it was the right of those who were interested in the estate to obtain letters of administration with the will annexed. (2 R. S. 71, § 17.) If this had been done, the bonds could have been obtained at once and no loss would have occurred. As Mrs. Fish, while enjoying the income and having the control over the bonds, did not assert her right to the custody of the same, or if she had no right, the appointment of an administrator with

the will annexed was not applied for or made for a long time, the loss was not caused by the neglect of Fowler as executor of Fish, but by the failure of the parties in interest to avail themselves of the right they had to take and secure the bonds. The negligence was with them and the loss was occasioned by their fault, as they had it in their own power to protect themselves.

The case of *Walton v. Walton* (1 Keyes, 18; 2 Abb. Pr. [N. S.] 428), cited by the appellant's counsel, differs essentially from the case at bar. The action was brought by an administrator to compel the executors of the deceased executor of the estate which the plaintiff represented to account for assets unadministered in his hands, but there was no surviving executor into whose hands the property had been delivered, and the defendant's testator had in his possession the property of the estate unaccounted for at the time of his death. Besides, there was no question involved as to the negligence of the executor, or as to the right of the parties in interest to administer upon the estate.

There is, we think, no valid ground for claiming that the bonds inventoried never came into the hands of Odell, and the bonds hypothecated by Odell and sold for the payment of the loan were not those referred to in the inventory and lost to the estate. The findings of the court are in a contrary direction and are sustained by sufficient evidence.

A number of questions were raised upon the trial in regard to the admission of evidence, but none of the rulings of the judge in reference to the same show any such error as demands a reversal of the judgment.

The question made as to giving costs against the estate of Nathaniel Fish related to the discretion of the judge, and is not the subject of review upon this appeal.

The judgment should be affirmed.

All concur. FOLGER, C. J., and EARL, J., concurring in result.

Judgment affirmed.

Liability for loss, theft, or destruction of estate securities.—Executors or administrators are not guarantors of the safety of securities in

their charge belonging to the estate. They are bound to exercise only such care and prudence as men of average discretion usually employ in the protection of their own property. *Mikell v. Mikell*, 5 Rich. (S. C.) 220; *Rubottom v. Morrow*, 24 Indiana, 202; *Estate of Secondo v. Bosio*, 2 Ashm. (Penn.), 487; *Whitney v. Peddicord*, 63 Illinois, 249; *Fitzsimons v. Fitzsimons*, 1 S. C. 400; *Noble v. Jones*, 35 Texas, 692; *Neff's Appeal*, 57 Penn. St. 91; *Campbell v. Miller*, 38 Geo. 304; *Farman v. Coe*, 1 Caine's Cases, 96; *Berry v. Parks*, 3 S. & M. (Miss.) 625; *Smith v. Hurd*, 8 Id. 682; *Bailey v. Dilworth*, 10 Id. 404.

The English rule is the same. *Jones v. Lewis*, 2 Ves. Sen. 240; *Massey v. Bonner*, 1 Jac. & W. 248.

But Lord Ellenborough laid down a different rule in law in *Crosse v. Smith*, 7 East, 258.

An administrator, not chargeable with any want of due care, is not liable for money belonging to the estate which is stolen by burglars from the safe of the administrator. *Stevens v. Gage*, 55 N. H. 175.

The same rule prevails in Missouri, where it has been repeatedly held that executors and administrators are in no sense insurers of the property of the decedent, and in the absence of negligence are not liable in case of robbery. *State v. Meagher*, 44 Mo. 356; *Fudge v. Durn*, 51 Id. 284.

Where an administrator retained money of an estate for more than five years, and made no effort to settle up the estate, held that for the loss of the money through failure of a bank in which he had deposited it, he was liable, though he had not been otherwise negligent. *Wood v. Myrick*, 17 Minn. 406; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Knott v. Coffee*, 16 Beav. 80.

So when executors had lent securities improvidently, though in good faith, held liable. *Re McDonald*, 4 Redf. (N. Y.) 321.

Neither administrators nor executors are bound to insure the property that comes into their hands, nor even to continue the insurance of the decedent. *Dortch v. Dortch*, 71 N. C. 224; *Tuttle v. Robinson*, 33 N. H. 104; *Croft v. Lyndsey*, 2 Freem. 1; *Bailey v. Gould*, 4 Y. & Coll. 231.

If an executor puts bonds and notes into the hands of a lawyer for collection, and the attorney, after the death of the executor, collects and misapplies the money, the estate of the executor is not chargeable with the loss. *Rayner v. Pearsall*, 3 Johns. Ch. 578.

See *Spaulding v. Wakefield's Estate*, *ante*, page 14; *Carpenter v. Carpenter*, 1 Am. Prob. R. 448.

KUNKEL vs. MACGILL.

[56 Maryland, 120.]

SPECIFIC LEGACY.—“FIVE THOUSAND DOLLARS” OF SPECIFIED BONDS.

Testator devised “five thousand dollars of the W., C. and A. Railroad bonds, also 237 shares” of another company’s stock, with other similar gifts. He died thirteen days after executing his will, owning five of such bonds of the face value of \$1,000 each, but selling in the market at thirty cents on the dollar. *Held*, that the legacy was specific of the five bonds testator owned.

BILL for the construction of a will.

William Ritchie and *William P. Maulsby, Jr.*, for the appellants.

Bradley T. Johnson and *Fred. J. Nelson*, for the appellees.

ROBINSON, J. The controversy in this case arises upon the construction of the following bequest:

“I give and bequeath to my daughter Mary E. Kunkel five thousand dollars Northern Central Railroad Bonds; also thirty shares of Frederick and Woodsborough Turnpike Road Company stock; also twenty shares of the Philadelphia, Wilmington and Baltimore Railroad Company; also five thousand dollars of the Wilmington, Columbia and Augusta Railroad Bonds; also two hundred and thirty-seven shares of the Baltimore and Reisterstown Turnpike Road Company; also my sewing machine.”

The will was executed on the 18th of November, 1876, and on the 1st of December, thirteen days after its execution, the testator died.

Among his effects were found five bonds of the Wilmington, Columbia and Augusta Railroad Company, each of the denomination or face value of \$1,000, the market value of which, however, according to the proof, was about thirty cents in the dollar.

The appellants contend that the legacy is one of five thousand dollars in value, and must be construed, either as a bequest of \$5,000 in money with the Wilmington, Columbia and Augusta Railroad bonds demonstrated as the fund, primarily charged with the payment thereof; or as a bequest of \$5,000 worth of such bonds, with direction to the executors to purchase for the legatee, bonds of said company to the value of \$5,000.

On the other hand, the appellees insist that it is a legacy of bonds of the railroad company of the face value of \$5,000, and that the bequest is gratified by the delivery to the legatee of five one thousand dollar bonds of said company.

The question then is, whether this bequest, when construed in connection with other parts of the will, is to be considered as a general demonstrative or specific legacy?

Ordinarily there is not much difficulty in determining to which of these classes a legacy belongs.

If the testator bequeaths a specific thing as distinguished from all others of its kind, as money in a certain bag, or my Maryland State bonds, such a legacy, it is clear, is specific, and the legatee is entitled to the thing bequeathed.

Where, however, the bequest is of a sum of money, or of shares of stock, without further description or reference, and which may be satisfied by the delivery to the legatee of any stock of the kind designated, such a legacy is general.

A demonstrative legacy is in the nature of a general legacy, with a certain fund pointed out for its payment, as a gift of \$1,000 to be paid out of the fund due by A.; and if the fund thus designated fails, the legatee is entitled to be paid out of the general assets belonging to the estate. (*Kirby v. Potter*, 4 Vesey, Jr. 748; *Sibley v. Perry*, 7 Ves. 522; *LeGrice v. Finch*, 3 Merivale, 50; *Giddings v. Seward*, 16 N. Y. 365; *Welsh's Appeal*, 28 Penn. St. [4 Casey], 363.)

To each of these classes, however, certain legal incidents attach, and the difficulty in determining to which class the legacy in many cases belongs, is mainly owing to the efforts on the part of courts to avoid the hardships growing out of such incidents. This is strikingly illustrated in the bequest of the shares of canal stock in *Robinson v. Addison*, 2 Beav. 521.

If the legacy is to be considered specific, then in the event of the testator's parting with the thing or property bequeathed, or if from any cause it should be lost or destroyed, the legacy fails. Then again, such legacies are not liable to abatement with general legacies, nor are they liable to contribution towards the payment of debts. And hence the inclination on the part of courts to construe legacies as general, unless a contrary intention plainly appears. But however strong may be this inclination, and into whatever refinements this course of judicial decision may have led, all the cases agree that the governing principle in this, as in all other questions upon the constructions of wills is the testator's intention, and if it appears, either from the terms of the bequest itself when separately considered; or when construed in connection with the rest of the will, that he meant to give the specific thing, such intention must prevail.

So the question in this case is narrowed down to this, does it appear from the face of the entire will, that the testator intended to give to his daughter, the five railroad bonds of the Wilmington, Columbia and Augusta Railroad, each of the denomination or face value of \$1,000, which were found in his possession at the time of his death, or did he mean to give to her \$5,000 in money, with these bonds designated as the fund primarily liable for the payment of the same, and the deficiency, if any, to be paid out of the general assets of his estate, or did he mean to give to her \$5,000 worth of such bonds?

Government securities, bonds and shares of stock of corporations, it is admitted, may be specifically bequeathed. The words "my," or "in my possession," or "standing in my name," and other like expressions, referring to the *corpus* of the fund, have generally been relied on as showing such intention. *Barton v. Cook*, 5 Ves. 461; *Norris v. Harrison*, 2 Madd. 280; *Choat v. Yeates*, 2 Jac. & Walk. 102.

None of these terms are affixed to the Wilmington, Columbia and Augusta Railroad bonds in this bequest, and in view of the decision in *Dryden v. Owens*, 49 Md., 364, it may be that if the question depended solely upon the construction of the terms of the bequest itself, the mere fact that five bonds of

said company, each of the face value of \$1,000, were found in the possession of the testator at the time of his death, would not be sufficient to show that he intended to give these identical bonds to the legatee.

But in dealing with this question, regard must be had to the rest of the will, and if taken as a whole, such appears to have been his intention, the legacy must be regarded as specific, although the clause in question might receive a different interpretation considered separately. (*Everett v. Lane*, 2 Iredell's Eq. 548; *Stickney v. Davis*, 16 Pick. 19; 2 Leading Cases in Equity, part 1, 656.)

Now the will upon its face shows, that the testator was possessed of a number of government bonds, railroad bonds, shares of railroad stock, and stock of other corporations, all of which he divided among his wife and five children.

To his wife he gives ten thousand dollars, United States five-twenty bonds; also five thousand dollars of Baltimore and Ohio Railroad bonds, payable in the year 1885; also five thousand dollars of *my* Northern Central Railroad bonds; also the mortgage of three thousand dollars on the lands of Thomas D. Riggs, and one large painting over the mantel in the parlor, and also all my furniture in my bed room.

To his son John S., he gives five thousand dollars of *my* Baltimore and Ohio Railroad bonds; also twenty shares of *my* stock in the Philadelphia, Wilmington and Baltimore Railroad Company; also ten shares of my stock in the First National Bank of Frederick; also my set of china given to me by my sister Marion.

To his son Robert, he gives five thousand dollars of *my* Baltimore and Ohio Railroad bonds; also twenty shares of stock in the Philadelphia, Wilmington and Baltimore Railroad; also one bond of one thousand dollars of *my* United States five-twenty bonds; also *five thousand dollars in cash*; also my walnut wardrobe standing in the hall on second floor of my dwelling.

To his son William, he gives five thousand dollars of *my* Pittsburg and Connellsville Railroad bonds; also twenty shares of my Philadelphia, Wilmington and Baltimore Railroad stock;

also one thousand dollar bond of my United States five-twenty; also my plated tea set.

To his son Alexander, he gives five thousand dollars of my Northern Central Railroad bonds; also twenty shares of my stock in the Philadelphia, Wilmington and Baltimore Railroad Company; also one hundred shares of my stock in the Citizens' National Bank of Baltimore.

To his son John, he also gives his brick store-house, and stock of hardware, &c.

He then bequeaths all his steamboat stock to his five children, to be divided equally between them.

The rest of his property, real and personal, he directs to be sold, and the proceeds thereof to be divided equally between his children.

It is thus plain upon the face of the will, that the testator intended to divide among his children the bonds and stocks then held by him.

In one clause he gives twenty shares of *my* stock in the Philadelphia, Wilmington and Baltimore Railroad Company. In another clause, and to another son, he gives twenty shares of the same stock, but without using the word "*my*."

Then again, he gives to one child five thousand dollars Northern Central Railroad bonds, and to another five thousand dollars of "*my*" Northern Central Railroad bonds. And so in the bequest of the Baltimore and Ohio Railroad bonds. In one clause he uses the word "*my*," and in another he bequeaths the bonds of the same company without prefixing "*my*."

We think it is plain, therefore, that the testator intended to divide among his several children *especially*, the bonds and stocks then in his possession, and that the omission in some instances of the word "*my*," does not change or affect the nature of the legacy.

And when he gives to the appellant five thousand dollars of the Wilmington, Columbia and Augusta Railroad bonds, this bequest, when considered in connection with the rest of the will, and the proof that five bonds of said company, each of the face value of \$1,000, were found in his possession at the time of his death, and that his death occurred only thirteen

days after the execution of the will, it is clear he intended to give to his daughter these identical bonds. We cannot think he intended to give \$5,000 in money, with these bonds pointed out as the fund to be applied to the payment thereof, and the balance to be paid by his executors, much less can we suppose he intended that his executors should purchase \$5,000 worth of such bonds, then dishonored in the market, and worth but thirty cents on the dollar.

In *Dryden v. Owings*, the decision was based entirely upon the terms of the bequest itself, and there was nothing in the rest of the will to show an intention on the part of the testator that he meant the legacy to be specific. I was inclined to the opinion that the legacy was specific in that case, and the doubts then entertained have not, I must confess, been weakened by the further consideration of the subject.

Be that, however, as it may, we all agree the bequest in this case must, in view of the whole will, be considered specific.

Decree affirmed.

See *Metcalf v. First Parish in Framingham*, 1 Am. Prob. R. 11; *Smith v. McKitterick*, 1 Id. 49.

ANDERSON vs. CARY.

[36 Ohio St. 506.]

DEVISE.—CONDITION AGAINST ALIENATION VOID.

Testator devised his farm to his two sons upon condition that they should not sell the same until ten years after one became of age, except to one another; neither should they mortgage it. *Held*, That the devisees took a fee. That the condition was void as repugnant to the devise and contrary to public policy.

THIS action was commenced on December 26, 1874, by the plaintiff, in the Court of Common Pleas of Ashland county, to

subject certain real estate, as the property of Thomas C. Cary, to the satisfaction of certain alleged liens, by mortgage and levy of execution, which the plaintiff claimed to have secured for certain indebtedness of said Thomas to him. The liens claimed by plaintiff are upon the undivided half of a certain tract of land devised to said Thomas and his brother, Charles L. Cary, by the eighth item of the will of their father, George W. Cary, executed in the year 1867, at which time both Thomas and Charles were minors, Charles, the younger, being about fourteen years of age.

The defendants are said Thomas and Charles, Mary Elizabeth Cary, their mother, and widow of said George W. Cary, and divers others, claiming liens on said undivided half of said lands. The principal defense, however, is made by Charles L. Cary, who claims to be the owner of the entire tract free from all incumbrances, as will hereafter appear.

The claim of the plaintiff, James Anderson, may be stated thus: On January 1, 1872, Thomas C. Cary, being then of full age, in consideration of money loaned, executed to the plaintiff his promissory note for \$1,500, payable in one year, with interest at the rate of eight per cent.; and to secure the payment thereof executed (with his wife) a mortgage upon the undivided half of said tract of land, which was duly recorded in Ashland county, where said lands were situate. Afterwards, in December, 1874, the plaintiff obtained judgment on said note by confession, under a cognovit, against said Thomas, in the Court of Common Pleas of Richland county, and caused execution thereon to be levied on said undivided half.

Thereupon, the mortgages having been executed by said Thomas upon his interest in said lands, and other executions against him having been levied thereon, this suit was brought to marshal liens and sell the property to satisfy the same.

After the commencement of this action, and after service of summons, to wit: on March 22, 1875, by contract in writing, Thomas C. agreed to sell and convey his undivided half of said lands to Charles L., in consideration whereof Charles L. agreed to pay to Thomas the sum of \$7,125, to be applied chiefly to the satisfaction of the debts of said Thomas, which he had

secured by mortgage or judgment liens on said premises. In this contract, however, the lien of the plaintiff (if lien he had) was postponed to junior liens, so that the purchase-money was exhausted before the claim of plaintiff was satisfied.

By this contract of purchase Charles claims that, under the will of his father, by which alone the estate of Thomas in said lands was created, his right to the undivided half devised to Thomas is indefeasible and unincumbered by any lien or claim in favor of the plaintiff.

In the Court of Common Pleas judgment was rendered against the plaintiff, whose petition was dismissed. From this judgment the plaintiff appealed to the district court, where the case, with an agreed and certified statement of facts, was reserved for decision in this court.

Dirlam & Leyman, for plaintiff.

Harrison, Olds & Marsh, for defendant.

MOLLVAINÉ, J. The decision of this case depends on the construction and effect to be given to the last will and testament of George W. Cary. The question to be decided is, did the plaintiff, by his mortgage from Thomas C. Cary, or by his levy upon the same premises, acquire a lien thereon? The plaintiff claims that the interest or estate of Thomas C., devised to him in the eighth item of his father's will, as to the farm on which the testator resided, was subject to a lien under both the mortgage and execution; and that the subsequent sale of this interest or estate, by Thomas to Charles, did not displace the lien either of the mortgage or the levy. These claims of the plaintiff are contested by Charles. What, then, was the true intent of the testator? And, what, the force and effect of this devise?

The provisions of the will which at all affect the question before us are as follows:

"Item Fourth.—I give and bequeath to my beloved wife, Mary Elizabeth, the sum of six hundred dollars, to be paid out of my personal estate, one hundred dollars of the same to be

paid over to her out of the first moneys collected by my executor.

"Item Fifth.—I give and bequeath to my two sons, Thomas C. Cary and Charles Lincoln Cary, the residue of moneys and the proceeds of my obligations after giving the legacies aforesaid, the same to be divided equally between them, share and share alike.

"Item Sixth.—The balance of my personal estate, consisting of personal property, farming implements, stock, cattle, sheep and all other property, personal, except one top buggy and such surplus of grain on hand as shall not be needful for the purposes of the farm, which are to be sold by my executor, I give and bequeath to my wife aforesaid, and to my children before named for the purposes of carrying on my farm, until my oldest son, Thomas C. Cary, arrives at full age, they, the said family, to use the said property in common for the purposes of carrying on said farm and enjoying the proceeds of the same, and when my oldest son arrives at the age of majority, then I desire that my said daughter, Mary Elizabeth, shall sell her interest in the said property so held in common to my said wife and sons, before named. Then the said Mary to have for her said interest in said last named property the appraised value of such property as has been appraised and such property as has been accumulated from said farm during said period, prior to the said majority of said Thomas, to be equally divided, and the said Mary Elizabeth to be paid such amount for her interest as shall be agreed upon between them, she to sell to them, the said sons and my said wife, her interests in said property as aforesaid.

"Item Seventh.—I give and bequeath to my said wife all my household and kitchen furniture, beds, bedding of every kind whatever, and when my said son Thomas shall have arrived at the age of majority as aforesaid, from and after that time I give and bequeath and so direct that my said wife shall have in lieu of dower one-third of the rents and profits of the farm on which I now reside in Green township aforesaid, as long as my said wife shall remain my widow, and in the event of her marriage then I order and direct that she shall forfeit her said dower

as aforesaid, and in lieu thereof I direct that my two sons, Thomas and Lincoln, shall pay to her the sum of twenty-five hundred dollars, one thousand of which shall be paid within sixty days after such marriage and the balance in three equal annual payments without interest. This last item and the six-hundred-dollar item and the former provisions made in the foregoing specifications are to be in lieu of all her dower in all my real estate, including three hundred and twenty acres of land I own in the State of Iowa.

“Item Eighth.—I give and bequeath the farm on which I now live, of two hundred and eighty-five acres, to my two sons, Thomas and Lincoln, upon the following conditions: 1. I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or incumber said farm in any manner whatsoever, except in the sale to one another as aforesaid. I also give and bequeath to my two sons aforesaid, two hundred and forty acres of land lying in the southeast corner of Fayette county, Iowa, which I received by deed from Richard Probert, and the same is now on record in said county; also eighty acres of land in Chickasaw county, Iowa, which I received by deed from A. H. Crawford.”

What estate in the home farm did the testator intend, by the eighth item, to give to his sons? By section 55 of the wills act of 1852, in force when this will was made, it was provided, “every devise of lands, tenements and hereditaments, in any will hereafter made, shall be construed to convey all the estate of the deviser therein, which he could lawfully devise, unless it shall clearly appear by the will that the deviser intended to convey a less estate.” The estate of the deviser in these lands was an absolute fee simple. By other provisions in this will, it is clear that the testator intended that, from the majority of Thomas, his widow, so long as she remained a widow, should have one-third of the rents and profits of said farm. Whether the right thus given to the widow was an interest in the land, or an interest in the rents and profits as such, it is quite clear

to our minds that the fee simple absolute, subject to the right of the widow, passed to the sons, as fully and amply as the testator "could lawfully devise" it. It is true, the testator coupled with the devise the words: "Upon the following conditions: I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or incumber said farm in any manner whatsoever, except in the sale to one another as aforesaid." But by these conditions (so nominated) we do not understand that the testator intended a forfeiture upon breach; there is no limitation over in favor of any one; and if a forfeiture for the benefit of his heirs was intended, the devisees, being two of his three heirs, would each have inherited a third part; so that, as heir of the testator, Thomas C. had full power to charge one-third of the land by mortgage to the plaintiff. But there is no indication in the will, or in the circumstances of the testator, that he intended, in any event, to die intestate as to this property; while, on the other hand, it seems clear to us that the testator intended, in all events, that his sons should take this farm, subject to the rights given to their mother, to have and to hold the same to them and their heirs forever. Instead of giving to his sons an estate in the land less than a fee simple, his intent and purpose was to give them the fee simple, but to eliminate therefrom its inherent element of alienability, for a limited period, or to incapacitate his devisees, although *sui juris*, from disposing of their property for the same limited period, to wit: until the younger should arrive at thirty-one years of age—each and both of which purposes are repugnant to the nature of the estate devised.

By the policy of our laws, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force. *Hobbs v. Smith*, 15 Ohio St. 419.

Of course, we do not deny that the owner of an absolute estate in fee simple made by deed or by will transfer an estate therein less than the whole, or may transfer the whole upon conditions, the breach of which will terminate the estate granted, or that he may create a trust whereby the beneficiary may not control the corpus of the trust, or even anticipate its profits. But as we construe this will, nothing of the kind has been here attempted. The attempt here was to fasten upon the estate devised a limitation repugnant to the estate, which limitation, and not the devise, must be for that reason declared void.

It is contended on behalf of defendant, Charles L. Cary, that by this devise an estate in trust, until the younger son should arrive at the age of thirty-one, was created for the benefit of the widow and children of the testator. That such was the effect of the so-called "conditions," when construed in connection with other clauses of the will. We do not so understand the will.

When the elder son, Thomas, arrived at age, the daughter ceased to have any right whatever in the devised premises.

The right of the widow to one-third the rents and profits of the farm was not affected by the arrival of Charles at thirty-one years of age, and did not affect the absolute character of the devise to the sons. If she took during widowhood one-third of the lands, the sons took a vested remainder in that portion, and a present vested estate in the other two-thirds. If her right was to rents and profits as such, and the same was made a charge upon the lands, the estate of the sons nevertheless vested in them and for their own benefit, subject to the incumbrance. The relation of trustee and *cestui que trust* existed between them in no proper sense. The grantees of the sons would have stood in the same relation to the widow. No relation of personal confidence or trust was created, but one growing out of property rights alone—strictly legal rights. Whatever may have been the desire of the testator as to his widow remaining on this farm after the majority of the elder son, it is quite clear that the rights of the devisees were not made to depend on that event. The personal relations of the members

of his family were not provided for after the arrival of Thomas at age, but their property rights, respectively, were defined; and the rights of neither were subjected to the control or supervision of the other. There was no trust created.

If we could find in this devise a trust in favor of the widow, until Charles should arrive at thirty-one years of age (and certainly there was none before, if not after), so that no absolute estate vested in the sons previous to the termination of such trust estate, or if we could find a condition which prevented the vesting of the fee for such limited period, or a condition subsequent upon the happening of which the estate devised could be defeated, a different conclusion, no doubt, would be reached.

But the case before us, is the devise of an absolute fee, with a clause restraining the alienation and incumbering of the estate for a limited period, intended, no doubt, for the protection of the devisees, who alone are interested in the estate devised. In holding that such restraint is repugnant to the nature of the estate devised, and is void as against public policy, which in this State, in the interest of trade and commerce, gives to every absolute owner of property, who is *sui juris*, the power to control and dispose of such property, and subjects the same to the payment of his debts, we are fully aware of the fact that many authorities may and have been cited to the contrary. Others, however, support the view we have taken, but I shall not attempt either to review or reconcile the cases, being content to rest the decision upon what we conceive to be sound principle and sound policy. The owner of property cannot transfer it absolutely to another, and at the same time keep it himself. We fully admit that he may restrain or limit its enjoyment by trusts, conditions or covenants, but we deny that he can take from a fee simple estate its inherent alienable quality, and still transfer it as a fee simple.

Decree for plaintiff.

MERCHANTS' NATIONAL BANK vs. WEEKS.

[53 Vermont, 115.]

POWER OF ADMINISTRATOR TO BORROW MONEY AND PLEDGE
ESTATE PROPERTY.

An administrator has no legal power, or right, to borrow money, and pledge the property of the estate in payment.

If an administrator borrows money, he is personally liable; but whether it is to be repaid from the estate, is a question for the Probate Court, on the settlement of his account.

THIS cause was heard at the December Term, 1878, Caledonia county, on demurrer to the bill. Ross, Chancellor, *pro forma*, sustained the demurrer, and dismissed the bill. The bill is sufficiently stated in the opinion of the court, except it was alleged that the money, so loaned to the administrator, was used by him for the benefit of the estate, and the heirs; and prayed for a writ of sequestration to sequester the property of the estate.

A. M. Dickey & Son, for complainant.

Belden & Ide, for defendant.

REDFIELD, J. This case was heard on demurrer to the orator's bill. The bill avers, in substance, that the orator loaned money to the defendant, as administrator of Nehemiah Weeks' estate, and took his note for the loan; that defendant has assets in his hands belonging to the estate of Nehemiah Weeks sufficient to pay this debt; that defendant is personally poor, and in bankruptcy. Hiram Weeks, administrator, is the sole party.

There is no one interested, as heir, creditor, or otherwise, in the assets of this estate made parties; or in position to protect the assets of the estate from being perverted, and misappropriated by the administrator. The administrator is bound

to take the possession and care of property of the intestate, and appropriate the same under the direction of the Probate Court. He has no legal power or right to *borrow* money, and pledge the property of the estate in payment; and not having the power to bind the property of the estate, he binds himself. The bill, then, in its aim and purpose, seeks to obtain a decree, appropriating the assets belonging to the heirs of the intestate, to pay the private and personal debts of the administrator. This is not a proceeding, in due course of law, to distribute a portion of the estate to a person on whom right or title is cast by law. There is no party defendant that represents the heirs; or has an interest to protect the estate, or resist its sequestration. If there were equity in the bill, the court would not proceed to a final decree, unless the parties in interest were before the court. But we think there is no sound equitable ground for relief. If the orator "supposed" that the administrator had the legal right to borrow money and pledge the assets of the estate for its payment, he was mistaken in the *law*, and it was his misfortune, and not a ground for relief. It is said that the money borrowed was used by the defendant for the benefit of the estate. If the administrator pays money in properly caring for the property of his trust, whether the money is borrowed or comes from his own pocket, it is the proper province of the Probate Court to reimburse the administrator, by crediting such disbursements in his administration account; and the sureties in his official bond have an equity, superior to any creditor of the administrator, to diminish, or prevent, their liability for a *devastavit* of the estate. And we think the Probate Court possesses every equitable power that could properly be exercised by this court; and this court will never interfere with matters appropriately belonging to probate jurisdiction, except in aid of that court.

In *Luscomb v. Ballard*, 5 Gray, 405, the court say: "The law is, that by a promise, the consideration of which arises after the death of the intestate, the estate cannot be charged, but that the administrator is personally liable in his contract. And whether the amount is to be repaid from the estate, is a question for the Court of Probate in the settlement of his

account." See, also, *Sumner, Admr. v. Williams*, 8 Mass. 162; *Taylor v. Mygatt*, 26 Conn. 184. In *Freeman v. Holt*, the Supreme Court of this State held the same doctrine—Windsor county, 1879. The case of *Field et al. v. Wilbur et al.* 49 Vt. 157, relied upon by the orator, has not much analogy to this case. The defendant Wilbur, in that case, residing in Georgia, held in trust a small farm in this State. He employed orators to build a barn on this farm. The bill was brought to charge the property with the cost of building the barn. The court, Ross, J., say: "Usually third persons, making such improvements at the request of the trustee, are confined to their personal surety against the trustee. There are exceptions to this rule. When the trustee resides abroad, as in this case, and has no property that the orators can reach, and when the trust property has been enhanced in value, and made more productive, by the expenditure and labor of orators thereon, we think the orators have the right to have their improvements on the property made a charge on the property and its income." And the court decreed that the *trust* property be charged, not for the cost of the barn, but "only for such sum as the trust property has been enhanced in value by the erection of the barn." The Court of Equity had the sole jurisdiction in that case. In this case the estate is in due course of settlement and distribution in the Probate Court, which has special and exclusive jurisdiction, by law.

The decree of the Court of Chancery is affirmed, and cause remanded.

See *Carter v. Manufacturers' Bank*, 1 Am. Prob. R. 198.

BROWN vs. MERRILL.

[181 Massachusetts, 324.]

DEVISE TO WIFE.—ESTATE IN FEE OR FOR LIFE.

A will contained the following clause: "To my wife M. I bequeath, demise and assign, and, in case of her death, then to her heirs and assigns forever, all the residue of my property, this not to conflict with her rights of dower, should there be children born to us, then the child or children to share alike with my wife as residuary legatee." The testator died without children. *Held*, that his wife took an estate in fee.

BILL in equity, filed February 19, 1881, by Mary R. Brown and Frank Brown, to compel the specific performance by the defendants of an agreement to purchase certain real estate in Boston. Hearing before Field, J., who reported the case for consideration of the full court, in substance as follows:

The sole title of the plaintiffs to said real estate was derived under the will of Horatio W. Preston, which was duly proved and allowed, and the residuary clause of which was as follows: "To my darling wife, Mamie R. Preston, I bequeath, demise and assign, and, in case of her death, then to her heirs and assigns forever, all the residue of my property, this not to conflict with her rights of dower, should there be children born to us, then the child or children to share alike with my wife as residuary legatee."

The testator died on October 13, 1878, seized and possessed of said real estate in fee simple, leaving a widow, the female plaintiff (now the wife of the other plaintiff), and no issue, there having been no child or children born to them. The title now remains in the female plaintiff.

The plaintiffs are now residents of the State of Maryland, where the testator lived, and where the will was proved and allowed. The will was also afterwards duly proved and allowed in this Commonwealth.

By consent of parties, the statutes of Maryland and the reported decisions of its courts may be read and considered as

evidence of the law of Maryland, if and so far as the same may be applicable.

F. Peabody, Jr., for plaintiffs.

B. L. M. Tower, for defendants.

MORTON, J. This case turns upon the question, whether under the residuary clause of the will of Horatio W. Preston his widow took a fee or an estate for life. The will was evidently drawn by an unskilled hand, but we think it appears from it with reasonable certainty what were the intentions of the testator. The words, "to my darling wife I bequeath, demise and assign all the residue of my property," are sufficient to carry an estate in fee in his real property. If they stood alone, no one would doubt that it was intended to give a fee. The added words, "and, in case of her death, then to her heirs and assigns forever," are susceptible of several constructions. They may have been intended to provide for the case of the death of his wife before the testator, in which case, as she has survived him, they are inoperative, and would not defeat or cut down the fee given her by the first part of the devise. Or they may have been used as equivalent to the words "at her decease," in which case under our laws she would take an estate for life with remainder to her heirs. Gen. Sta. c. 89, § 12. Or it may have been that the testator, having an imperfect knowledge that the words "heirs and assigns" are commonly used in deeds and wills to denote a fee, intended to use these words as words of limitation, supposing that the devise was equivalent to a devise to his wife, "her heirs and assigns." This is the only construction which gives any effect to the words "and assigns." In which case, by rejecting the words "in case of her death then" as surplusage, and inadvertently and ignorantly used, the wife would take a fee.

The prime object in construing a will is to ascertain the intention of the testator. This, being ascertained, will prevail, unless it is inconsistent with some fixed rule of law. There are no established rules of law which fix the construction which

must necessarily be given to the inartificial and peculiar language used in this will, and therefore we must look to the whole will to ascertain the intentions of the testator.

If the testator had intended to give his wife only a life estate, he would naturally have used the words "for her life," or "for her natural life," these being the most direct and most commonly used, and therefore the most probable words which would occur to the ordinary mind. The fact that they are not used has some tendency to show that he intended to give a fee. In the last words of the devise, he speaks of her as "residuary legatee," an expression implying that she is to have the residuum, that is, all the residue of his property, and not merely a partial interest in it. But a stronger reason for supposing that he intended his wife to take a fee is found in the clause making provision for his children, if he should have any. This clause is "should there be children born to us, then the child or children to share alike with my wife as residuary legatee." We can have no doubt that he intended that his children, if he had any, should take estates in fee in their shares, and the direction that they are "to share alike with my wife as residuary legatee" implies, almost conclusively, that his understanding was that by the terms of the will she was to take an estate of the same nature as the estate which his children would take, that is, an estate in fee, and not merely a life estate.

We are therefore of opinion that the testator's intention was to give his wife a fee, and that this intention may be carried into effect either by construing the words "in case of her death then to her heirs and assigns forever" to mean "if she shall die before me," or by construing them as meant to be the ordinary words of limitation used to denote a fee. As events have happened, it is immaterial which of these constructions is adopted, and it is not necessary to decide between them. Upon either, the will gives to the plaintiff a fee; she and her husband joining with her can convey to the defendants a good title; and, according to the terms of the report, a decree should be entered for the plaintiffs as prayed for in their bill.

It is not shown or suggested that the laws of Maryland, where the testator died, differ from our laws so as to affect the

result of this case, and we are therefore not called upon to consider whether the laws of Maryland or of this State should govern in case they had been different.

Decree for the plaintiffs.

See, generally, as to construction of devises as in fee or for life, Foote v. Saunders, *ante*, page 78, and cases in note.

HORTON'S APPEAL.

[94 Penn. St. 62.]

ALLOWANCE FOR MAINTENANCE TO GUARDIAN WHERE WARD LIVED IN HIS FAMILY.

A ward was the niece of the wife of her guardian, and lived with him as one of his family, worked therein, and was boarded, clothed and schooled as one of his own children. The guardian frequently declared to the ward and others that he regarded her as one of his children, and would do by her as his own. He never applied to the court for an allowance for her support, nor did it appear that he made any charge in his books for her maintenance. *Held*, that the guardian had placed himself *in loco parentis* to his ward, and was not entitled to a credit in his final account for her maintenance.

APPEAL of Harriet Horton from the decree of the court in the matter of the guardianship account of Henry W. Wheaton.

Wheaton was the guardian of the appellant, and filed his final account February 26th, 1874. Among the exceptions of the ward was one to an item of credit for \$325 claimed by Wheaton for the board of his ward for two hundred and sixty weeks. The account was referred to an auditor, A. W. Bertholf, Esq., from whose report it appeared that the appellant was a niece of Wheaton's wife, and went to live with him in August, 1864, when she was about eight years of age; that in the fall of said year her mother and her father, who was a sol-

dier in the army, both died, and Wheaton was appointed her guardian; that she lived with her guardian until 1871, resided in his family, worked for him, and was boarded, clothed and schooled by him the same as his own children; that Wheaton never applied nor obtained an order of court for an allowance for his ward; that she was legally eligible to attend the soldiers' orphan school without expense for maintenance and tuition during the time she resided with her guardian, and that he never sent her nor made application for her admission; that he frequently told his ward that he had taken her as one of his own children; that he had often said to his neighbors that he had taken her as his own child and would treat her as such, and that he did not want any one else to school her; that the expenses of said guardian in maintaining his ward in excess of what she earned was \$234, but that said guardian had never made any charge for maintenance in his books.

The auditor was of opinion that under these circumstances Wheaton could not charge said ward for her board, clothing, &c., and refused to allow any part thereof, and surcharged him with \$325, the amount claimed by him in his account.

The court, Jessup, P. J., was of opinion that the guardian was entitled to the amount expended in the maintenance of the ward in excess of her earnings, and allowed him a credit of \$234 as that amount. From this decree this appeal was taken.

Littles, Blakeslee & Allen, for appellant.

McCollum & Watson, for appellee.

PAIXON, J. The auditor found that the appellant is a relative by marriage of her guardian, the appellee, being a niece by blood of his wife, and that she lived with her said guardian as one of his family; that she worked therein, and was boarded, clothed and schooled as one of his own children; that she was generally strong and healthy, and able to perform a reasonable amount of labor; that the guardian never applied for and obtained an order of court for an allowance for the support of the ward, nor does the evidence show that the guardian made

any charge on his books for the support of his ward during the time she resided in his family. All this is consistent with the allegation, abundantly sustained by the evidence, that the guardian had placed himself in *loco parentis* to his ward. We have the further fact found by the master, that the orphan was eligible to admission to the school for soldiers' orphans at Harford, where she could have been schooled and maintained without expense. Her guardian was under no legal duty to place her there, but it is a circumstance to be considered when he attempts to charge her with the cost of her board and maintenance during the years that she was a member of his family, and if the evidence is to be believed, doing his chores, milking his cows and feeding his pigs.

The learned auditor rejected the claim of the guardian for the support and maintenance of his ward. In doing so he was clearly right. While relationship, either by consanguinity or affinity, except in the case of parent and child, does not of itself rebut the presumption which the law raises, that a promise to pay is intended when personal services are rendered, yet, as was said in *Smith v. Milligan*, 7 Wright, 107, it tends to rebut such presumption, and if accompanied by other evidence is sufficient. In *Douglas's Appeal*, 1 Norris, 169, the decision is directly to the point, that when a step-father takes his step-child to live with him as one of his family, he is not entitled to be repaid for expenditures made for her during her minority. *Duffy v. Duffy*, 8 Wright, 399, is equally in point. See, also, *Ruckman's Appeal*, 11 P. F. Smith, 251.

We are of opinion that the court below erred in sustaining the exceptions filed by the guardian to the report of the auditor. They should have been dismissed and the report confirmed.

The decree is reversed at the costs of the appellee, and it is ordered that distribution be made as reported by the auditor.

Generally as to allowances to guardians for maintenance, see *Gott v. Culp*, ante, p. 64.

JONES vs. CALDWELL.

[97 Penn. St. 42.]

EQUITABLE CONVERSION.—PROVISION FOR NO SALE IF HEIRS
AGREE TO DIVIDE.

A positive testamentary direction to an executor to sell the testator's real estate, after the death of his widow, effects an equitable conversion thereof. And a daughter to whom the testator, by a subsequent clause in his will, gave and bequeathed a share of his estate, takes no interest in the real estate which can be bound by a judgment obtained against her in the lifetime of the testator's widow.

A subsequent provision in the will, that if the heirs shall agree to a division of the estate among themselves, the executor shall not be bound to sell, does not prevent a conversion.

ERROR to the Court of Common Pleas, No. 2, of Philadelphia county.

Case stated, in the nature of a special verdict, filed by agreement of the parties, wherein Israel C. Caldwell was plaintiff and Thomas C. Jones defendant, setting forth the following facts :

Michael Address, late of the city of Philadelphia, died June 28th, 1865, seized in fee simple of, *inter alia*, a house and lot of ground situate on the south side of Noble street, No. 139, in the city of Philadelphia. He left to survive him his widow, Sophia Address, five sons and three daughters, among whom was Mary B. Durrell, intermarried with Edward Durrell.

By his last will and testament, dated February 7th, 1864, duly proved July 5th, 1865, he directed, *inter alia*, as follows :

"Item.—After my decease, should she survive me, I give and bequeath all the income of my real estate, with all the debts due me and all the personal and mixed estate of whatsoever and wheresoever found, to my beloved wife, Sophia Address, during her natural life or while she shall remain my widow, she paying all the taxes, water-rents, ground-rents and interest due on the mortgages on said estate or that shall become due, and all the interest due or to become due on the notes of hand held against me, and keeping the property in good repair."

Then followed the clause set forth in the opinion of the court, succeeded by the following direction :

"Item.—After my own and my wife's decease, I give and bequeath to my five sons, Conrad B. Address, Michael M. Address, Samuel C. Address, William Address and Isaac T. Address, one-eighth or share and share alike of five-eighths of my said estate, and to my three daughters, Mary B. Durrell, Rebecca Wood and Harriet Johnson, or either of their heirs or assigns, the three remaining three-eighths or share and share alike of the said three-eighths."

Sophia Address, the testator's widow, died July 5th, 1878.

On September 10th, 1874, Israel C. Caldwell, the plaintiff here, recovered a judgment for \$229 against Mary B. Durrell, one of the daughters of the said testator, who had become and then was a widow. She died intestate, October 31st, 1876. On November 26th, 1879, Thomas C. Jones, administrator *de bonis non cum testamentum annexo* of Michael Address, deceased, sold the testator's real estate at public sale under the authority contained in the will. Israel C. Caldwell thereupon released the lien of his judgment from the premises sold, in consideration of an agreement by Jones, the administrator, that he would retain, out of the proceeds of sale, a sufficient sum to pay Caldwell's judgment, with interest and costs, provided it be determined that Mary B. Durrell's interest in the real estate of Michael Address, her father, was such, on September 10th, 1874, that Caldwell's judgment, recovered on that day, attached thereto as a lien, and remained a lien at the time of the sale.

If the court be of the opinion that on the above facts the plaintiff is entitled to judgment, then judgment to be entered for plaintiff for \$229, with interest from September 10th, 1874, and costs; but if not, then judgment to be entered for defendant; either party reserving the right to take a writ of error, &c.

The court entered judgment for the plaintiff for \$304 50; whereupon the defendant took this writ of error, assigning for error the entry of judgment for plaintiff.

Joseph A. Abrams and *Joseph L. Tull*, for plaintiff in error.

Rudolph M. Shick, for defendant in error.

PAXSON, J. The portion of the will of Michael Andress which is the subject of the present contention is as follows: "After my own and my wife's decease, it is my will that my executor shall dispose of all my property, real, personal and mixed, without application to the Orphans Court; and I hereby authorize my said executor to make legal deeds to suit purchasers of any of my real estate, provided, nevertheless, that they shall publish in two daily newspapers one month, daily, showing the time and place where the same is to be disposed of, which shall be at public auction; but my executor shall not be bound to make such advertisement or sale if all the legal heirs or their legal representatives shall agree to a division of said estate among themselves." The will then directs the proceeds of such sales to be divided among his eight children, share and share alike.

The single question for our consideration is, whether the will works a conversion of the real estate. If it does, the judgment obtained by the defendant in error against Mary B. Durrell, one of the testator's children, was not a lien upon the real estate, and the judgment entered by the court below upon the case stated must be reversed.

An absolute direction to sell lands after the death of the testator's widow, and to divide the proceeds among his children, effects an equitable conversion thereof into personalty, and the interest of one of the children is not bound by a judgment against him, before a sale, as real estate. *Allison v. Wilson*, 13 S. & R. 330; *Morrow v. Bernizer*, 2 Rawle, 185; *Burr v. Sim*, 1 Whart. 252; *Allison v. Kurta*, 2 Watts, 185; *Gray v. Smith*, 3 Id. 289; *Simpson v. Kelso*, 8 Id. 247; *Hess v. Shorb*, 7 Barr, 231; *Willing v. Peters*, Id. 287; *Silverthorn v. McKinster*, 2 Jones, 67; *Parkinson's Appeal*, 8 Casey, 455; *Wilson v. Shoenberger*, 10 Id. 121; *Brolasky v. Gally's Executors*, 1 P. F. Smith, 509; *Evan's Appeal*, 13 Id. 183; *McClure's Appeal*, 22 Id. 414.

In order to work a conversion, however, the direction to sell must be positive and explicit. It must not rest in the discretion of the executor, nor depend upon contingencies. A direction to sell upon a future contingency does not effect an

equitable conversion until an actual sale. *Nagle's Appeal*, 1 Harris, 260; *Bleight v. The Bank*, 10 Barr, 131; *Stoner v. Zimmerman*, 9 Harris, 394; *Anewalt's Appeal*, 5 Wright, 414; *Chew v. Nicklin*, 9 Id. 84.

The direction in the will of Michael Address to sell his estate is as explicit as language can make it. Does the subsequent provision, that, if his heirs shall agree to a division of the estate among themselves, the executor shall not be bound to sell, operate to prevent a conversion? We are of opinion that it does not, for the reason that the provision referred to is surplusage and may be stricken from the will without altering its legal effect. It merely gave the heirs the right to elect to take the property as real estate. The law gives them this right independently of the will. It is well settled that where real estate is ordered to be sold, the parties interested in the proceeds may elect to take the land as such. *Smith v. Starr*, 3 Whart. 62; *Rice v. Bixler*, 1 W. & S. 445.

The testator must have intended a conversion even in the event of a division of the estate among the heirs by agreement. There were eight heirs, and there appears to have been but five separate properties of unequal values. Be that as it may, to have divided them would have required either a sale between themselves or partition according to law. The latter would have necessarily involved an appraisement and sale, and hence a conversion. It was held in *Laird's Appeal*, 4 W. N. C. 473, that a provision by a testator in his will, that any of his sons may take his real estate at an appraisement, does not prevent equitable conversion under an explicit direction that his real estate be sold and converted into money.

The foregoing views are not in serious conflict with *Neely v. Grantham*, 8 P. F. Smith, 433. The facts of that case are essentially different. A testator directed that his wife should have his mansion-farm for life, and further ordered: "It is my will that if any one or two of my children wish to hold the old mansion property, after two of them is of age, they can do so by agreeing among themselves; if they cannot agree, they can get three disinterested persons to divide and agree for them, the eldest to have the first choice, and each of my children's share

remaining in the property until they arrive at twenty-one years. If, in case none of my children purchase the old mansion, it must be sold to the best advantage for the use of my children, and not until after the decease of my wife." An attachment in execution was issued against the son, and served on the executors as garnishees. It was held that the attachment bound the proceeds of the sale of the lands in the hands of the executors. Thompson, C. J., and Read, J., being of opinion that there was no conversion, but that the land was bound as such by the attachment; Sharswood, J., that the order to sell worked a conversion, and it was bound as personal estate; and Strong and Agnew, JJ., dissented. It will thus be seen that while three of the judges concurred in the judgment, though for different reasons, four were of opinion there was no conversion.

It must be conceded that the distinction between *Neely v. Grantham*, and the later case of *Laird's Appeal*, *supra*, is very slight. Yet there is a difference. In *Laird's Appeal* the provision was that *any* of the testator's sons might take the real estate at the appraisal. This required an agreement between the sons as to *who* should take. They could have so agreed, and the property could have been taken without the provision of the will. In either event there would have been a sale and a conversion of the estate into money, which is precisely what the testator intended. In *Neely v. Grantham* the provision was "that if *any one or two* of my children wish to hold the old mansion property, after two of them is of age, they can do so by agreeing among themselves; if not agreeing, they can get three disinterested persons to divide and agree for them, the eldest to have the first choice, and each of my children's share remaining in the property." This clause of the will could not be stricken out without essentially changing its legal effect. The right is not given to all the children to take; it is to one or two only, and the eldest to have the right of choice. It is true the children might have dispensed with all this by agreement. Nevertheless, rights are given to a portion of them to the exclusion of others. It is

not, as is in the case in hand, a provision which confers upon the children just what the law gives them without the will.

Neely v. Grantham does not seem to have been called to our attention, when *Laird's Appeal* was decided. It was not cited, so far as the report shows, nor is it referred to in the opinion of the court. It appears, however, to have been rightly decided, and does not need qualification. The principle we regard as sound, that where there is a positive direction in a will to sell real estate, and it is coupled with no qualification as to a division of the property between the heirs, other than that which the law gives, such direction to sell works an equitable conversion. I do not see that this interferes with *Neely v. Grantham*; if it does, that case must give way to this extent to the later case of *Laird's Appeal*.

The judgment is reversed, and judgment for the defendant below upon the case stated.

What necessary to constitute conversion.—A direction in a will to executors to sell the real estate of the testator, and distribute the proceeds among persons named constitutes a constructive, or equitable, conversion. *Gallup v. Wright*, 61 How. (N. Y.) 386; *Flanagan v. Flanagan*, 8 Abb. N. C. 418; *Mathis v. Griffin*, 8 Rich. (S. C.) 79; *Wilkins v. Taylor*, Id. 291; *Dobson's Estate*, 11 Phila. (Penn.) 81; *Masterson v. Pullen*, 62 Ala. 145. See, also, *Cruse v. Barley*, 3 P. Wms. 20; *Ackroyd v. Smithson*, 1 Bro. C. C. 508; *Walker v. Shore*, 19 Ves. 387; *In re Estate of Stevenson*, 2 Del. Chan. 197; *Morris v. Morris' Exec.* 4 Houst. (Del.) 414.

If it appears from the will that the testator *intended* that his executors should sell, though they are not absolutely directed to do so, the property will be deemed in equity converted into money. *Phelps v. Pond*, 23 N. Y. 69; *Wheldale v. Partridge*, 5 Ves. 388; *Blount v. Blount*, 54 Ala. 360; *Whitehead v. Wilson*, 29 N. J. Eq. 396; *Gray v. Henderson*, 71 Penn. St. 368; *Dodge v. Williams*, 46 Wis. 70; *Gould v. Taylor Orphan Asylum*, Id. 106. But see, *contra*, *Chew v. Nicklin*, 45 Penn. St. 84; *Edward's Appeal*, 47 Indiana, 144; *Seeger v. Seeger*, 21 N. J. Eq. 90, where it is held that conversion is a question of intention, and to effect it by will the direction to convert therein must be positive and explicit.

There is a conversion, notwithstanding a direction in the will postponing the time of the sale. *High v. Worley*, 33 Ala. 196; *Hocker v. Gentry*, 3 Metc. (Ky.) 463.

But conversion is not to be presumed beyond the purposes of the will. *Orrick v. Bachus*, 49 Md. 72.

And where the purposes for which the conversion is ordered are invalid

as a whole or in part, the conversion fails *pro tanto*. *Giraud v. Giraud*, 58 How. (N. Y.) Pr. 175.

Time conversion deemed complete.—Conversion is to be regarded as complete from the death of the testator. *Reiff v. Strite*, 54 Md. 298; *Wurts v. Page*, 19 N. J. Eq. 365.

But if the conversion is directed to be made upon the happening of a contingency, then it will date from such contingency when it arises. *Taylor v. Johnson*, 68 N. C. 381.

And if the land is to be sold at the executor's discretion as to time, there is no conversion until an actual sale. *Christler v. Meddis*, 6 B. Mon. (Ky.) 37; *Id.* 249.

General words, giving executor power "to settle my estate as they judge best," do not confer a power to sell real estate or operate as an equitable conversion. *Skinner v. Wood*, 76 N. C. 109.

In case there is a direction to sell the realty for a particular purpose, it is not a conversion of the real estate into personalty except for that purpose and to that extent. *Hilton v. Hilton*, 2 MacArthur, 70.

Election to take land instead of proceeds.—The right of devisees to take the land itself rather than the proceeds, is well established. *Ridgway v. Underwood*, 67 Illinois, 419; *Green v. Johnson*, 4 Bush (Ky.), 167.

But *all* the devisees must elect to take the land or it must be sold. *Shallenberger v. Ashworth*, 25 Penn. St. 153; *Harcum's Exec. v. Hadwall*, 14 Grattan, 369. *Contra*, *Mandelbaum v. McDowell*, 29 Mich. 78.

The election must be made promptly, and it will be too late to elect to take the land after a sale of it under a decree at the suit of the administrator. *Craig v. Jennings*, 81 Ohio St. 84.

A slight expression of intent is sufficient to show an election to take the land, if the parties are of lawful age, provided the rights of others are not affected thereby. No positive act is required. *Prentice v. Janssen*, 79 N. Y. 478.

The will of Anneke Jantz Bogardus, who died in 1668, in the village of Beverwyck (now Albany), directed, *inter alia*, that his "four first-born children shall divide out of their father's property the sum of one thousand guilders, to be paid by them out of the proceeds of a certain farm, before any other division takes place." It is held that this did not amount to a conversion, inasmuch as the doctrine of equitable conversion, as known to the English law, did not exist in the Dutch law, which prevailed in New Netherlands at the time the will was made. *Van Giessen v. Bridgford*, 88 N. Y. 348.

MERRICK vs. MERRICK.

[37 Ohio St. 126.]

**DEVISE OF LAND.—CORRECTION OF DESCRIPTION PARTLY
ERRONEOUS.**

devised his lands to B. for life, in the following words: "All the . . . real estate I may die seized of." He owned 160 acres of land, and no more, one-half of which was in section 27 and the other moiety was the east half of the north-east quarter of section 28. He devised the portion in section 28, by a correct description, to C., at the death of B., charged with certain legacies, and devised the portion in section 26 to D., at the death of B., charged with certain legacies, but by mistake in the particular description of the land devised to D., the word *south* was inserted instead of *north*. *Held*, that so much of the description as is erroneous should be rejected, and that the land will pass to D., on the death of B., by the other provisions of the will.

In 1875, Adam R. Merrick, executor of and a devisee under the will of Adam Merrick, brought suit in the Court of Common Pleas of Van Wert county, against J. J. Merrick and others. In the petition it is shown that Adam Merrick, on January 13th, 1872, executed his will of that date in due form, which will is as follows: "I do give and bequeath to my beloved wife, Mary Merrick, all the personal and real estate that may die seized of, to have and to hold during her natural life, and all the personal estate of whatsoever kind I may die seized of, she my said wife is to have to dispose of as she may think best at her death, should she outlive me.

"Item 2. I give and bequeath, after the death of my wife, to my son, Robert Merrick, the west half of the north-west quarter of section number twenty-seven (27), township one (1), south range three (3) east, he paying Frank Merrick, son of J. J. Merrick, two hundred dollars, at the time he, Frank Merrick, arrives at his majority; and he is to pay Isia O. Merrick, daughter of J. J. Merrick, at the time she arrives at her majority, one hundred and fifty dollars. Elmer Merrick, the oldest son of Isaac Merrick, two hundred dollars at the time he arrives at his majority.

"Item 3. I give and bequeath to my son Adam R. Merrick,

after the death of my wife, the east half of the south-east quarter of section number twenty-eight (28), township one (1), south range three (3) east containing eighty acres of land, more or less. And he, the said Adam R. Merrick, has to pay Mary Elsie Merrick, his daughter, three hundred dollars, when she arrives at her majority, and his son, Charles H. Merrick, two hundred dollars, at the time he arrives at his majority, and he is to pay to Adam W. Smith, one hundred and fifty dollars at the time he arrives at his full age or his majority.

"Item 4. I give and bequeath to Alice Eteline Stewart, daughter of John Stewart, deceased, three hundred dollars at my death, if she outlives me, to be paid out of my personal estate, at the time she arrives at her majority.

"Item 5. I do appoint my son, Adam R. Merrick, executor of this my last will and testament. I do hereby revoke all former wills by me made."

That on November 18, 1872, the will was admitted to probate in the Probate Court of Van Wert county, and said Adam R. Merrick accepted the trust as executor under the will, and received letters testamentary as such executor:

That neither at the time the will was made, nor subsequently, did Adam Merrick own any other lands than the following: the west half of the north-west quarter of section 27, and the east half of the north-east quarter of section 28, both tracts in Hoaglin township, Van Wert county:

That by the third item in his will, above set forth, Adam Merrick intended to devise to Adam R. Merrick the east half of the north-east quarter of section 28, above mentioned, but by mistake of the draftsman, the land was described in the will as the east half of the *south-east* quarter of said section 28, in which tract Adam Merrick had no interest at or after the time the will was made:

That by a proper construction of the will, the word *south*, in said third item, should be read *north*:

That Adam W. Smith, and other legatees, whose legacies are charged upon the real estate, as appears by the will, have arrived at majority, and their legacies are payable:

And that doubts are entertained by the executor, and others

interested in the will, as to the proper construction and meaning of the third item of the will, with respect to the land devised.

The prayer is that the court will declare the proper construction and meaning of the will, in the particular aforesaid, to the end that the rights of the legatees and devisees, and the duty of the executor, may be known, and the legacies may be paid.

The defendants, heirs of Adam Merrick, denied the allegations of the petition as to the mistake and the intention of the testator.

The widow of Adam Merrick is still living.

The District Court, to which the cause was appealed, by its judgment construed the will as the plaintiff below claimed it should be construed, and the defendant below, on leave, filed in this court a petition in error to reverse the judgment.

Alexander & Saltzgaber and *I. D. Clark*, for plaintiffs in error.

Price & Shissler, for defendants in error.

OKEY, J. By statute, authority is granted to an executor to maintain a civil action in the Court of Common Pleas, asking the direction of the court in any matter affecting the trust estate or property to be administered, and the rights of the parties in interest. (54 Ohio L. 202, § 8; Rev. Sts. § 6202; and see *Rothgeb v. Mauck*, 35 Ohio St. 503.)

This jurisdiction Adam R. Merrick has invoked; and the evidence fully supports the claim that, while the will on its face is free from ambiguity, the word *south*, in its third item, was inserted by mere mistake of the scrivener, the testator intending that the word *north* should be used. The sole question, therefore, is whether, on proof of such fact, it is competent for the court to declare that the east half of the north-east quarter of section 28 passed by the will to Adam R. Merrick at the death of his mother.

As there is a parcel of real estate which is accurately de-

scribed in the third item of the will, it might well be argued, if that clause stood alone, that the testator must have believed he had some devisable interest in the land, and hence that the devise related to such land, although, in point of fact he had no interest in it whatever. (*Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *Kurtz v. Hibner*, 55 Ill. 514; 2 Randolph & Talcott's *Jarman on Wills*, 403.) But the clause does not stand alone, nor is it to be construed as standing alone. On the contrary, regard must be had to the whole instrument; and while the will can only be properly construed by its words, we may be aided in such construction by evidence of the situation of the testator, with respect to his property and the objects of his bounty, at the time the language was employed. (*Worman v. Teagarden*, 2 Ohio St. 380.)

The inquiry, then, is whether the description in the third item is referrible to the fact that the testator must have supposed he had a devisable interest in the premises there described, or whether the mistake claimed, that is, the use of the word *south* when *north* was intended, was really made. Which is the more reasonable supposition? It appears that the testator had no interest whatever in the land there described, at the time or after the will was executed. It then belonged to and was in the possession of his son Isaac, and the theory that the testator was perfectly aware of that fact is certainly reasonable. On the other hand, he did own the east half of the north-east quarter of the same section—indeed, resided on it when the will was made and until he died; and it is not denied that it is embraced in the devise to his wife, for he devised to her, for life, *all* his real estate, consisting of two eighty-acre tracts. One of these tracts he devised by proper description to his son Robert, on the death of his mother, charged with certain legacies, and unless the other tract was devised to Adam R., at the death of his mother, it will pass at her death to the testator's heirs. But a testator is not presumed to intend to die intestate as to any interest in his property to which his attention seems to have been directed. (*Collier v. Collier*, 3 Ohio St. 369.) Again, unless the testator intended by the third item to devise the tract in the north-east quarter which he really owned, why

postpone the taking effect of such devise until the death of his widow? Isaac, as we have seen, was the owner and in possession of the land in the south-east quarter, and it is not reasonable that the testator believed his widow could derive any advantage from a devise to her of that land during life. Moreover, why charge the land devised to Adam R. with the payment of \$650 in legacies, unless he intended to devise the premises he really owned? Would he make such charge on land in which he had no interest, on the supposition that he had some claim upon it? Besides, at the time the will was executed, Adam R. Merrick had resided with his family on the north-east quarter in question for more than six years, and he continued to reside thereon. Is it not reasonable to suppose that the testator desired him to have the land upon which he resided? Clearly, all the land which the testator owned was devised to his wife for life, and the inference is irresistible that the same land, and no other, was devised to his two sons, Robert and Adam R., at the death of Mrs. Merrick. One moiety of it passes by clear words to Robert, on the death of his mother; and, rejecting the erroneous description, the word *south*, sufficient appears on the face of the will, in the light of the facts here disclosed, to warrant us in saying that by the will of Adam Merrick the other moiety, the east half of the north-east quarter of section 23, Hoaglin township, Van Wert county, passes to Adam R. Merrick on the death of his mother. And thus the case is determined by a just and proper application of the maxim, *Falsa demonstratio non nocet*. (*Ashworth v. Carleton*, *Banning v. Banning*, 12 Ohio St. 381, 437; 1 Randolph & Talcott's *Jarman on Wills*, 734, 744; 2 Id. 390.)

Judgment affirmed.

Construction and effect of erroneous description of devisee or subject-matter of devise. *Moreland v. Brady*, 1 Am. Prob. R. 441; *Higgins v. Owen*, *infra*; *Judy v. Gilbert*, *ante*, p. 89.

DETROIT FIRE AND MARINE INSURANCE CO. vs.
ASPINALL.

[44 Michigan, 330.]

ADMINISTRATOR'S MORTGAGE. — FAILURE TO COMPLY WITH
STATUTES.

An administrator's mortgage given upon the estate to raise money to pay its debts is invalid if the order allowing it does not follow the statute and specify the time for which it may run and the rate per cent. at which it shall be given. The good faith of the parties will not make it valid.

APPEAL from the Superior Court of Detroit, on bill to foreclose.

Moore, Canfield & Warner, for complainant.

Wilkinson, Post & Wilkinson, for defendants.

MARSTON, C. J. The complainant company seeks to foreclose a mortgage given it upon real estate by the administratrix of Philip Aspinall deceased.

A license was granted by the Probate Court to the administratrix to mortgage certain property of the deceased, but "no time or rate per cent., upon the basis of which said mortgage should be executed, was specified in the license. No report was made by the administratrix to the Probate Court, of her action in mortgaging said property, and the Probate Court never passed upon the question of time and rate per cent. contained in said mortgage."

That the statute (2 Com. L. § 4,626) was not complied with, and that this was fatal to the validity of the mortgage, as such, as decided in *Edwards v. Taliafero*, 34 Mich. 15, must be considered as beyond question.

It is claimed, however, that certain equities exist in favor of the complainant, under which the mortgage may by the court be held effectual; among these, the good faith of the parties; the fact that a mortgage for nearly this amount upon

real estate of the deceased, was from moneys received upon the mortgage in suit paid and discharged, should be considered.

We have carefully considered all the equities presented in favor of the complainant. If a non-compliance with the statute, § 4,626, can thus be avoided, then in all cases where the parties act in good faith, and the money is used to pay and discharge debts of the deceased, it becomes a dead letter. But it is only for the purpose of paying debts against the estate of the deceased that the judge of probate may empower an administrator to mortgage the estate. Such a construction as is contended for would make the statute in effect a nullity.

The mortgage taken up by the proceeds of the one in suit, was not upon the same property or any part of the property described in the mortgage in this case. Had this mortgage been given upon the same property, to take up a previous one, then it might become important to consider whether complainant could not to that extent be subrogated to the rights of the prior mortgagee. Under the facts in this case we are of opinion that no such question can arise, and that the complainant can obtain no relief in this case.

The decree must be reversed and the bill dismissed with costs of both courts.

The other Justices concurred.

The provisions of the statute referred to are as follows :

SEC. 2. Such order [empowering an administrator to mortgage the estate for the payment of its debts] shall be obtained by petition to the proper judge of probate, * * * and such order shall specify the amount to be secured by such mortgage of other security, the rate of interest to be given, and the length of time for which such mortgage or other security shall be given. * * *

SEC. 3. * * * said proceedings of the said * * * administrator * * * in mortgaging or otherwise pledging such estate, shall be reported to the judge of probate, and by him be subject to be confirmed or vacated, and new proceedings to be had, to the same extent and in the same manner, as near as may be, as is now provided by law in the case of the sale of real estate.

PREBLE vs. PREBLE.

[78 Maine, 362.]

EXECUTOR AS WITNESS IN SUPPORT OF HIS OWN CLAIM.

An executor or administrator cannot testify in his own behalf in support of his private claim against the estate, which he nominally represents, but which in that instance is the real defendant against which he is proceeding as plaintiff.

ON report of the presiding justice.

An appeal from the allowance of Harriet R. Preble's alleged private account, she being the administratrix of her late husband, Benjamin Preble; the appellant, herself an heir, appearing for his heirs. The estate had been represented insolvent and commissioners appointed.

As to the charges for personal property (not money) the defense was the statute of limitations; six years elapsed after the charges and before the death of the intestate, which occurred on January 26, 1879, the claimant was his wife during that period of time. If those charges are legally barred by the statute of limitations, they are to be stricken from the claim. If not thus barred, or if it is a matter of discretion with the trial court, whether such a defense shall be allowed or not, then as to those items a trial is to be had.

As to the remaining items (for money), the heirs contended that a claim for them cannot be legally sustained, against their objection to the admission of such evidence, by either her own testimony or by her affidavit accompanying the claim. If that be so, then those items were to be expunged from the account. But if otherwise, or if it be a matter of discretion with the trial judge to admit such evidence or not, then as to those items a trial is to be had.

Upon a decision by the law court of the law questions presented, the case to be remanded to the trial court, for an arrangement and settlement of the case accordingly.

E. Hale & L. A. Emery, for appellant.

A. P. Wiswell, for administratrix.

SYMONDS, J. The administratrix of an insolvent estate, on appeal by an heir from the allowance in the Probate Court of her private claim against the estate, seeks to sustain it by her own testimony.

Is she a competent witness?

"The rules of evidence in special proceedings of a civil nature, such as before * * * courts of probate, shall be the same as herein provided for civil actions." R. S. c. 82, § 89; *Withee v. Rowe*, 45 Maine, 585.

"Nor have we more enlarged jurisdiction for the application of principles of equity, when exercising appellate authority as a court of probate, than we should have as a court of common law; for the rules of evidence, as well as of property, bind us equally in either capacity, except where by statute a difference is made." *Eveleth v. Crouch*, 15 Mass. 309.

It is clear that the testimony of the administratrix, a party to the record and directly interested in the event of the suit, is excluded by the common law. The statute which forbids the excuse or exclusion of witnesses on these grounds does not apply generally to cases in which one of the parties is the legal representative of a deceased person, but on the contrary usually excludes the survivor from testifying in his own favor, when the death of the other party to the contract or cause of action has rendered it impossible to have his evidence at the trial. In the excepted cases, in which the statute applies, notwithstanding the death of the adverse party, there is no provision that an executor or administrator, presenting a private claim against the estate, may testify in his own behalf in its support, adverse to the estate which he nominally represents, but which in that instance is the real defendant against which he is proceeding as plaintiff. The statute does not make the administratrix a competent witness, in this proceeding.

In *Ela v. Edwards*, 97 Mass. 318, it was held that an executor is not a competent witness in his own behalf to sustain a claim for services rendered to the testatrix in her lifetime: "The party plaintiff to the contract in issue and on trial, as well as the plaintiff of record, was the appellant in his individual right. The party defendant was the estate, of which the

appellant was the executor, but which was necessarily represented in this proceeding by the party objecting to the appellant's claim. The statute regulating the competency of parties to the record as witnesses applies equally to probate proceedings and to actions at law. The fact that the appellant was obliged to make his individual claim by stating it in his account rendered to the Court of Probate, instead of in a declaration in an action at common law, gave him no right to testify in his own favor since the death of the person whom he alleged to have made the contract which was the foundation of the claim." *Higbee v. Bacon*, 8 Pick. 483; *Bailey v. Blanchard*, 12 Pick. 165; *Granger v. Bassett*, 98 Mass. 468.

The duty of the executor or administrator to verify his account by oath, the power of the Probate Court to subject him to examination under oath, upon matters concerning his relations to the estate, his accounts and administration, are well recognized by the decisions cited. These result from his acceptance of the trust over which that court has supervision; or come directly by statute. They gave him no advantage as a witness, when he assumes the position of creditor of the estate. *Higbee v. Bacon*, 7 Pick. 14; *O'Dee v. McCrate*, 7 Green. 467; *Pope v. Jackson*, 11 Pick. 117; *Bradley v. Veazie*, 47 Maine, 85; *Sigourney v. Witherell*, 6 Met. 558; *Gould v. Carlton*, 55 Maine, 511.

As the statute of limitations is not urged in argument as a defense, it may properly be assumed that the lapse of time, during coverture, would not bar any items otherwise valid and proved.

Case remanded for trial.

See *Troup v. Rice*, 1 Am. Prob. R. 15

RHYMER'S APPEAL.

[93 Penn. St. 142.]

BEQUEST TO SAY MASSES.—STATUTE AS TO CHARITABLE USES.

testator, by a will executed within one month of his death, left a bequest to a church, to be expended in masses for the repose of his soul. The statute prohibits devises or legacies for charitable or religious uses unless by will executed at least one month before death. *Held*, that the bequest was within the statute and void.

APPEAL of Anastatia Rhymer, late Anastatia Power, and Charles G. Stewart, guardian of John and Mary Power, from the decree of the court sustaining the exceptions to the report of the auditing judge in the estate of Martin Power, deceased.

Martin Power died July 23d, 1874, leaving a will, dated July 9th, 1874. In this will he made a number of specific bequests, among which were several to Catholic institutions, and the residue of his estate he disposed of as follows:

"Item. All the rest, residue and remainder of my estate I give and bequeath to St. Mary's Catholic Church, to be expended in masses for the benefit and repose of my soul."

The account of the executors of the decedent was audited by Hanna, P. J., who held that the residuary bequest was for a "charitable" and "religious" use, and was void by virtue of the Act of April 26th, 1855, and that the amount thereof should be awarded to the appellants, the heirs of testator. Exceptions were filed to this ruling on behalf of St. Mary's Church, which the court sustained.

F. W. Patten and *H. F. Hepburn*, for the appellants.

A. A. Hirst, for the appellee.

STERRETT, J. By the residuary clause of his will, executed fifteen days before his death, the testator bequeathed "all the rest, residue and remainder" of his estate "to St. Mary's Catholic Church, to be expended in masses for the benefit and repose of" his soul.

It is contended that the bequest is void under the Act of 1855, the 11th section of which declares that "no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will attested by two credible and at the same time disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs according to law."

While the propriety of legislation which thus limits the right of giving for religious or charitable purposes may sometimes have been questioned, it has never been doubted that the act is constitutional, and the only question presented for our consideration is whether the residuary bequest is for either a religious or charitable use, and therefore falls within the prohibition of the statute.

The testator has clearly declared the use or purpose to which his bequest shall be applied. It is to be expended in masses for the benefit and repose of his soul. While this may not be regarded as a charitable use within the accepted meaning of the word, it is certainly in every proper sense of the term, and according to the obvious intendment of the act, a religious use. In the denomination with which the testator appears to have been identified the mass is regarded as a prominent part of the religious service and worship. According to the Roman Catholic system of faith there exists an intermediate state of the soul, after death and before final judgment, during which guilt incurred during life and unatoned for must be expiated; and the temporary punishments to which the souls of the penitent are thus subjected may be mitigated or arrested through the efficacy of the mass as a propitiatory sacrifice. Hence the practice of offering masses for the departed. It cannot be doubted that in obeying the injunction of the testator and offering masses for the benefit and repose of his soul the officiating priest would be performing a religious service, and none the less so because intercession would be specially invoked in behalf of the testator alone. The service is just

the same in kind whether it be designed to promote the spiritual welfare* of one or many. Prayer for the conversion of a single impenitent is as purely a religious act as a petition for the salvation of thousands. The services intended to be performed in carrying out the trust created by the testator's will, as well as the objects designed to be attained, are all essentially religious in their character.

It appears to us that the bequest to St. Mary's Catholic Church was clearly for a religious use, and therefore void according to the express terms of the statute. It follows that the schedule adopted by the auditing judge should have been confirmed by the court.

The decree of the Orphans Court is reversed at the costs of the appellee, and it is now adjudged and decreed that the residuary fund, viz., \$643 79, be distributed as follows, to wit: To Timothy Kelly, administrator of Mary Power (widow), \$214 59; to Anastatia Power, \$143 06; to Charles E. Stewart, guardian of John Power, \$143 07; to Mary Power, \$143 07.

BEADLES vs. ALEXANDER.

[9 J. Baxter, 604.]

DECLARATIONS OF TESTATOR PROVING DUE EXECUTION OF WILL.—
PRESUMPTION ON PROVING SIGNATURES OF WITNESSES.

Declarations by the testator that he executed the will in the presence of the attesting witnesses, are admissible to rebut the evidence of such witnesses to the contrary.

Proof of the genuineness of the signatures of the subscribing witnesses raises a presumption of attestation in testator's presence. Positive testimony to the contrary makes the question one for the jury to decide.

APPEAL from the Circuit Court.

Jordan & Stokes, for plaintiff.

Traver & Golladay and *B. F. Tanner*, for defendant.

McFARLAND, J. This issue *devisavit vel non*, was made up to test the will of John Alexander. It contains a devise of lands, and the question was, whether it was duly executed in the presence of two subscribing witnesses, as required by the statute. The paper was produced and the names of A. A. Massey and John W. Jacobs appear as subscribing witnesses. It was proven that Massey was dead and that his signature was genuine. Jacobs was introduced as a witness, and he testified that his signature was genuine, but he gives it as his best recollection that the testator was not present when he signed the will as witness. He says the will was brought to a certain beech log school-house where he was teaching school, by James Simms, and at the request of Simms, he (Jacobs) and Massey, signed it as witnesses, but according to his recollection the testator was not present.

The proponents thereupon undertook to establish by other testimony, that the testator was in fact present at the time. Here was proof to show that Simms, who has since died, had testified on a former trial that he wrote the will but was not present when it was executed. Several witnesses proved statements of the testator to the effect that Simms had written the will and that he himself had taken it to the beech log school-house, and there executed it in the presence of Massey and Jacobs, who witnessed it at his request. These statements of the testator were objected to, and the question is, were they properly admitted? After careful consideration we are of opinion they were. It is true it is laid down in Redfield on Wills, as the result of the authorities, that statements of the testator, not parts of the *res gestæ* and not showing the state of the testator's mind, but statements introduced merely to establish a particular fact by the force of the admission, are hearsay testimony and not admissible.

But a *prima facie* case arises upon proof of the handwriting of the subscribing witnesses, and it is conceded that when the subscribing witnesses fail to prove the due execution of the will by the testator, that they may be contradicted or impeached and the fact established by other testimony. The statements of the testator to this direct point do but most

strongly establish the fact. They do not stand as mere hearsay declarations of other parties. They are the declarations of the testator as to his own acts, and about which he must certainly know, and in general he has no motive to speak falsely, and both parties claim under him, one as devisee or legatee, the other as distributee and heir. His declarations are not introduced to establish the particular fact, by force of the admission or statements alone, but for the purpose of corroborating and supporting the presumption arising from the fact that the will bears the genuine signatures of two competent subscribing witnesses, and to contradict the testimony of the witness who, although he admits his signature, yet denies the testator's presence. It was held in North Carolina in three cases, that the statements of the testator are admissible generally, not merely as parts of the *res gestæ* or as showing the state of the testator's mind, but because they are the declarations of the only party having a vested interest to declare the whole truth, where all made the will and all could destroy it, and in either case the rights of no one else were affected. (See *Reel v. Reel*, 1 Hawk. 248; *Howell v. Barden*, 3 Dev. & Bat. 442, and *Hester v. Hester*, 4 Dev. & Bat. 248.) We hold that the circuit judge did not err on this question.

The next question is, whether the devisees and legatees under the will were competent witnesses to prove declarations of the testator. It is not insisted that our recent legislation makes them competent *subscribing witnesses*. The law as to subscribing witnesses remains as before, but the question is, may they be examined as other witnesses. This depends upon the construction of the act of 1869-70, T. & S. Statutes, sec. 813, *a, b, c, d*. The first section enacts that in all civil courts no person shall be incompetent to testify because he or she is a party or interested in the issue to be tried. The exception is in the next section, as follows: "In actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to the transaction with or statement by the testator's intestate or ward, unless

called to testify by the opposite party, or required to testify thereto by the court."

We hold that this case does not come within the exception; that it is not an action by the executor, in which judgment could be rendered for or against him in the sense of the above statute, but is a contest between the devisees and legatees on the one side, and the heirs and distributees on the other, and that the witnesses were competent, and the court, therefore, did not err in admitting them.

The spirit and meaning of the above statute is, that in a suit between the estate of a deceased person and a living party, that the latter shall not be allowed to give his version of the transactions with or conversations of the deceased, whose lips are closed. This in principle does not apply to the present case, where both the devisees and heirs are living and compelled to testify for themselves.

In his Honor's charge to the jury there are certain passages excepted to as follows: If this witness, Jacobs, says that he signed the paper as a witness, then the law presumes that he did so at the request of the testator in his presence; if he says he signed the paper not in the presence of the testator and at his request, this will weaken the presumption as to him; and if he says that he and Massey both signed, but not in the presence of the testator and at his request, that will weaken the presumption that arises from the proof of Massey's handwriting as well as his own, and that presumption will be affected and weakened in proportion to the value and weight of the testimony of Jacobs. If Jacobs admits his handwriting but denies that he attested the paper in the presence of the testator and at his request, this conflict between his testimony before you and the presumption from proof or admission of his handwriting will affect his credibility as a witness, and diminish the value of his testimony.

The court then proceeds to instruct the jury, that the plaintiff, as to Jacobs, is not bound by the rule^e that a party cannot impeach his own witness.

We think the above extract of the charge is too strong in this, that it conveys the idea that the presumption of law that

the testator was present when the will was inspected, which arose upon the admission of Jacobs that his signature was genuine, was still controlling, notwithstanding Jacobs' testimony upon the subject; that Jacobs' testimony only weakened the presumption, and as he testified to a fact, contrary to the presumption of law, that his credibility was thereby affected.

It is only in the absence of positive testimony on the subject that the presumption of law is controlling. When the fact that the signatures of the subscribing witnesses are genuine is established and nothing else appears, the presumption that the attestation was made in the presence of the testator is conclusive; but if there be positive testimony on the subject by the subscribing witness or otherwise, it then becomes a question for the jury to settle upon the evidence. And while the jury may take into consideration the improbability that a witness would attest the will in the absence of the testator, we are not prepared to say that the fact that witness proves that he did sign his name in the absence of the testator, goes to impeach his credit and to show that he was unworthy of belief. The credit due the witness should be left to the jury to determine, as in all other cases.

For this error the judgment should be reversed and a new trial awarded.

As to admissibility of testator's declarations to prove will, *Mercer v. Macdonald*, 1 Am. Prob. R. 399; as to effect of proving signatures of attesting witnesses, *Abbott v. Abbott*, 1 Am. Prob. R. 326; *Haynes v. Haynes*, Id. 268; *Brown v. Clark*, Id. 510, and note.

OURLEY vs. HAND'S ESTATE.

[58 Vermont, 524.]

PROVING INDORSEMENT AS CONTINGENT CLAIM.

An indorsement may, under the statute, be allowed as a contingent claim against the estate of a deceased person.

APPEAL from the Probate Court affirmed by the County Court.

The facts are sufficiently stated in the opinion.

E. A. Sowles, for plaintiff.

M. J. Hill, for defendant.

VEAZEY, J. This was an appeal from an order of the Probate Court disallowing a claim presented by the plaintiff against the defendant estate. The claim was based on a promissory note which James Hand executed to the plaintiff. The latter indorsed it during the life of Hand, waiving demand and notice, to Hiram Bellows, for valuable consideration. Hand died, and commissioners were duly appointed on his estate. Bellows died while the holder and owner of the note; and his executor did not present the note as a claim to the commissioners of Hand's estate for allowance. After they made their final report the plaintiff presented it to the Probate Court for allowance as a contingent claim.

The defendant insists that this debt is not affected with such contingency as is contemplated by the statute; that the contingency contemplated is the same as that in the statute relating to trustee process, and must be such as to affect the debt itself; and no other ground of defense is suggested. By the terms of the statute the claim of a surety against the estate of his deceased principal is a contingent claim, yet the principal owes nothing to the surety until the latter has paid the debt. The liability to the surety is contingent upon payment by him.

An indorser stands in substantially the same relation to the debt as a surety so far as concerns the element of contingency. He is liable to the holder, yet has no absolute claim against the estate of the maker until he pays the note. His claim is contingent upon the enforcement of the note against him. Therefore it is plainly within the spirit and just object of the statute, and within the definition of a contingent claim as given by Ch. Justice Poland in *Admr. of Sargent* against the *Admr. of Kimball*, 37 Vt. 320. He says: "A contingent claim is where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability." In this case the liability referred to in this definition would be that of the estate to the indorser; the future event on which the liability depends would be the enforcement of the note against the latter, which may or may not happen. If it does, the indorser should be reimbursed out of the estate.

In *Lytle v. Bond's Estate*, 39 Vt. 388, cited by defendant, the note was presented for allowance by the indorser as a contingent claim, and it was disallowed because it had become absolute by the indorser paying it before the commission closed and it could have been allowed by the commissioners as an absolute claim and should have been presented as such. But no suggestion was made by counsel or court that it was not a contingent claim as to the indorser before he made it absolute by payment.

The reason why this plaintiff should have this claim allowed as a contingent claim, and yet the estate of Hand not be liable as trustee of the plaintiff is plain. There is nothing due the plaintiff until he pays the note, and he may never pay it. There is no contingency about the debt. It is due absolutely from the estate. But a certain contingency must happen before it becomes a debt due the indorser. When that contingency happens the debt becomes absolute as to him. It is all the while trusteeable in a suit against the party entitled to have it allowed as an absolute claim, whichever he may be.

Under the trustee statute, the party cannot be holden as trustee if his liability depends on any contingency.

Under this statute providing for the allowance of contingent claims, if there is an outstanding claim against the estate which is now due to some other party, but which, upon the happening of some future event apparently liable, will become due to the contingent claimant instead of such other party, and which event may or may not happen, then he is entitled to have it allowed as a contingent claim.

The judgment of the County Court is reversed, and judgment that the claim as presented to the Probate Court is a contingent claim within the meaning of the statute, and let this be certified to that court.

Proof of Contingent Claims against Estate.—In New York, under the Statute prior to 1880, contingent liabilities, for which the estate is not primarily liable, or upon which its liability has not been fixed—*e.g.*, claims against the estate of a deceased partner for partnership debts, while the survivor is living and the remedy against him has not been exhausted—might properly be proved, and in the distribution a sum sufficient to satisfy such claim was directed to be retained by the surrogate. 3 R. S. (sixth ed.) 104, § 89; repealed by the Laws of 1880, chap. 245. *Hoyt v. Bonnett*, 50 N. Y. 538 (reversing s. c., 58 Barb. 529); *Whitlock's Estate*, 1 Tuck. (N. Y.) 491; *Williams v. Eaton*, 3 Redf. (N. Y.) 503; *Francisco v. Fitch*, 25 Barb. 180.

The fact that the claim is of such a nature that it could not be enforced during the lifetime of the deceased is nothing against its validity. *Selover v. Coe*, 68 N. Y. 488; *Hallett v. Hore*, 5 Paige, 315.

Upon the death of one of the joint makers of a promissory note, who signed simply as surety, his estate is absolutely discharged from the payment thereof both at law and in equity. *Risley v. Brown*, 67 N. Y. 160; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74.

In Maine the Statute provides for the payment of this class of claims against insolvent estates in certain specified cases. Rev. Stat., chap. 66, §§ 8 and 10; *Green v. Dyer*, 32 Me. 460.

In Connecticut commissioners of insolvency can only allow present liabilities susceptible of definite estimation. *Bacon v. Thorp*, 27 Conn. 251.

The Massachusetts Statute is construed in *Sturtevant v. Sturtevant*, 4 Allen, 122; *Ames v. Ames*, 128 Mass. 277.

As to the Statutes of Maryland and Iowa and their construction. Rev. Code of Maryland (1878), Art. 50, § 172; *Monteith Execs. v. Baltimore Ass.*, 21 Md. 426; Rev. Code of Iowa (1880), § 2414; *Brought v. Griffith*, 16 Iowa, 26.

A contingent claim which does not become absolute within the time limited for proving claims against the estate is not barred, but the holder may, after it becomes absolute, enforce it against heirs, devisees, legatees, or next of kin to the extent of the property of the estate received by them.

McKeen v. Waldron, 25 Minn. 466; Revised Code of North Car., chap. 46. 24, chap. 99, § 8; *Badger v. Daniel*, 79 N. C. 372; *Atty. Genl. v. Allen*, 6 Jones' (N. C.) Eq. 144; *Rouse v. Raynal*, Riley's S. C. Chan. 210.

There is no claim against the estate on a contingent obligation until after the contingency transpires, and it becomes an absolute debt. *Harrison's case*, 5 Co. 28, b; *Phillips v. Echard*, Cro. Jac. 8.

Legacies ought not to be paid unless some security is given by the legatee refund if the conditional obligation becomes absolute. *Hawkins v. Day*, Amb. 160; *Collins v. Croach*, 13 Q. B. 542; *Read v. Blount*, 5 Sim. 567; see also *Manning v. Style*, 3 P. Wms. 884; *Cox v. Joseph*, 5 T. R. 807; *Masson May*, 3 V. and B. 194.

An executor who pays legacies before other claims are disposed of, or without taking security of the legatees, does so at his peril. *Glacius v. Ogel*, 4 Redf. (N. Y.) 516; *Winegar v. Newland*, 44 Mich. 367.

See also *Terhune v. White*, *ante*, page 6.

COATES vs. MACKEY, ADMINISTRATOR.

[56 Maryland, 416.]

EFFECT OF JUDGMENT NOT EVIDENCE OF ASSETS IN JURISDICTION WHERE RECOVERED.—ACTION AGAINST ADMINISTRATOR PERSONALLY ON FOREIGN JUDGMENT AGAINST HIM AS ADMINISTRATOR.

A judgment against an administrator is not evidence of assets in his hands in the State where it was recovered, it cannot have such force in another jurisdiction.

No recovery can be had in this State against an administrator personally on a judgment recovered against him in his representative capacity in another State.

CROSS-APPEALS from the Circuit Court.

Albert Constable, for appellants.

Alexander Evans, for respondents.

GRASON, J. These are cross-appeals—the first taken by Coates and wife, the plaintiffs below, and the second by John L. Mackey, administrator of John Mackey, who was defend-

ant. The first appeal involves the correctness of the ruling of the court below, on the demurrer of the plaintiffs to the thirteenth plea, and the second involves the correctness of the ruling in sustaining the demurrer, to the tenth and fourteenth pleas.

It appears from the record, that John A. Mackey took out letters of administration on the personal estate of John Mackey in Chester county, in the State of Pennsylvania, and that the said John A. Mackey, and Arthur A. Mackey took out letters also upon the personal estate of the deceased in Cecil county, in this State. Coates and wife, the plaintiffs, recovered a judgment against John A. Mackey, the administrator in Pennsylvania, and then brought this suit against John A. Mackey, administrator in this State, on the judgment so recovered in Pennsylvania. John A. Mackey appeared to the suit and filed fifteen pleas. Issue was joined on the first plea, as also on the special replications filed to the fifth, sixth, seventh, twelfth and fifteenth pleas, and demurrers to all the other pleas, and the twelfth plea was withdrawn, and the demurrers were sustained as to all the pleas to which they were filed except the thirteenth, and was overruled as to it. The case was tried before the court, without a jury, upon the issues joined, and the findings and judgment of the court were in favor of the defendant, and both parties appealed. The case was submitted on briefs, at the April Term, 1880, of this court, and resulted in the judgment being reversed in June, 1880. Upon a motion for a re-argument filed by the administrator, John A. Mackey, the case was ordered to be re-argued upon notes, which have been filed, and the case has again received our careful consideration. The only question which we deem it necessary to decide, is that which is raised by the plaintiffs' demurrer to the thirteenth plea. This plea alleges, that John A. Mackey, administrator of John Mackey in Pennsylvania, is not personally liable on the judgment recovered against him by the plaintiffs in the Court of Common Pleas, in Chester county, in the State of Pennsylvania, on which this suit is brought, of his own goods and chattels, nor amenable, answerable or chargeable in this State, in manner and form as the plaintiffs have declared

against him; nor in Pennsylvania, except *de bonis intestatoris*; that is to say, of the goods and chattels of the intestate John Mackey, deceased, there administered upon and under the authority of the tribunals of said State, to which he is alone responsible concerning his said administration, and that he is and was in nowise answerable or liable in said State of Pennsylvania, *de bonis propriis*, or of his own estate, goods or chattels, at the time of bringing this suit, or at the time of the rendering of said supposed judgment, on which this suit is founded, or since; and that by the laws of Pennsylvania, and by the act of the legislature of that State, of February 24th, 1834, passed before the bringing of the suit upon which the said supposed judgment was founded, and then and still in force and unrepealed, and entitled "an act relating to executors and administrators," it is provided that the "omission of any executor or administrator to plead to any action, brought against him in his representative character, that he has fully administered the estate of the decedent, or any other matter relative to the assets, shall not be deemed an admission of assets to satisfy the demand made in said action; also the omission of the plaintiff to reply to any such matters when pleaded, shall not be deemed an admission of the want of assets as aforesaid; nor shall such omission otherwise prejudice either party, and no mispleading or lack of pleading by executors or administrators, shall make them liable to pay any debt or damages recovered against them in their representative character, beyond the amount of assets, which in fact have come, or may come into their hands."

The demurrer admits such to be the law of the State of Pennsylvania at the time the suit was brought in that State, and the judgment recovered, on which the present suit was brought, and the whole amount of which judgment is attempted to be recovered against John A. Mackey, the administrator in this State. The judgment sued on can have no greater or larger extent or force in this State than it is entitled to in the State where it was recovered, and in that State, under the provisions of the act pleaded, which we have quoted, this judgment, whatever may have been the pleadings or lack or omission of pleading, did not charge the administrator personally,

but affected only the assets in his hands belonging to the estate of his intestate. Nor did the recovery of the judgment furnish any evidence that there were such assets in his hands, the Court of Common Pleas of Chester county, in the State of Pennsylvania, being wholly without jurisdiction to decide whether there were or were not any assets in his hands. In that State the Orphans Court alone has such jurisdiction to ascertain and decide such questions. This seems to be clear from an examination of the various provisions of the Act of 1834, No. 52, before referred to, and from the decisions of the Supreme Court of Pennsylvania. In *Whiteside v. Whiteside*, 8 Harris, 473, Chief Justice Black, speaking for the court, said, "The exclusiveness of its jurisdiction, and the conclusiveness of its (the Orphans Court) decisions, have been placed by the acts of assembly and the decisions of this court, upon a foundation which cannot be shaken. If there be anything beside death, which is not to be doubted, it is that the Orphans Court alone has authority to ascertain the amount of a decedent's property, and order its distribution among those entitled to it. Again, in *Van Dyke's Appeal*, 10 Smith, 487, Chief Justice Sharswood, in delivering the opinion of the court, said, "It is also the settled doctrine that the jurisdiction of the Orphans Court within its appointed orbit, is *exclusive*. * * * That the court has jurisdiction in all cases wherein executors may be possessed of, or in any way accountable for any real or personal estate of a decedent. And in *Bard's Executors v. McGregor's Administrators*, 2 Grant, 365, the Supreme Court of Pennsylvania said, "According to the construction given to the several acts of assembly relative to the estates of decedents, judgment in a common law action against an executor or administrator, is only a judgment against the estate of the decedent. It does not bind the executor or administrator personally, although he may have omitted to plead that he had fully administered; such a plea, if put in, is now never tried in a common law action."

This being the law of Pennsylvania under which the judgment now sued on was recovered, the same law must be applied to it in this State when it is sought to be enforced against

the administrator personally; and as there is nothing in the record to show that the Orphans Court of Chester county, in the State of Pennsylvania, has ever ascertained or determined that there were any assets of John Mackey, deceased, in the hands of John A. Mackey, his administrator in that State, the thirteenth plea is a complete bar to a recovery against him in this suit, and the judgment appealed from will, therefore, be affirmed on the plaintiff's appeal.

The defendant's appeal must be dismissed. The judgment having been rendered in his favor, he cannot appeal therefrom.

Judgment affirmed.

Defendant's appeal dismissed.

JACK'S APPEAL.

[94 Penn. St. 367.]

CARE REQUIRED OF GUARDIAN IN MAKING INVESTMENTS.

Where a guardian in good faith accepts as cash from his predecessor in office, loans on judgment bonds subject to prior like liens which, at the time of acceptance, were such security as careful men would regard as good, and subsequently one becomes worthless through an extraordinary depression in real estate, he is not guilty of negligence making him chargeable with the loss.

APPEAL of Mary E. Jack from the decree of the court dismissing her exceptions to and confirming the report of the auditor appointed to pass upon the exceptions to the account of William N. Galbraith, her guardian.

The facts, as found by the auditor, H. C. Brubaker, Esq., were these: William S. Davis was appointed guardian by the court on June 15th, 1863, of the estates of William Jack, Matthew Jack, John C. Jack and Mary E. Jack (the exceptant), minor children of John Jack, deceased. In pursuance of an order of the court for the payment of the debts of the decedent,

the farm belonging to the estate of the said decedent was sold to Mrs. Mary R. Ferguson by the administratrix at and for the sum of \$80 per acre, consisting of one hundred and four acres and five perches, making an aggregate sum of \$8,332 50. This sale was confirmed *nisi* January 17th, 1871, and no exceptions having been filed was absolutely confirmed. The administratrix filed her final account April 8th, 1871, showing a balance in favor of the estate of \$4,811 64. This account was confirmed by the court. The balance exhibited in the account, as well as the whole fund, was comprised of the proceeds of said real estate, one-third of which was set apart according to law and fixed as a charge upon the said real estate for the use of the widow during her lifetime, leaving a net balance for distribution of \$3,207 76, which was distributed to the minor children and wards of said guardian, each ward receiving \$801 94. This money, with the exception of the share of William Jack, the oldest of the wards, was invested by the guardian in the real estate of Mrs. Mary R. Ferguson, the purchaser of said decedent's real estate, the said guardian having loaned her the money and taken therefor three separate bonds, with warrants of attorney to confess judgments from her, which were entered in the Court of Common Pleas of this county on October 12th, 1871. William Jack, one of the wards, became of age shortly after the money was received by the guardian from the administratrix of said decedent, and his share was paid to him then.

Three judgments, aggregating \$3,750, were entered against and became liens upon the said real estate of Mary R. Ferguson prior to the judgments entered by the guardian.

William S. Davis, as the guardian of the four wards, filed his account on April 5th, 1871, which exhibited a balance in his hands of \$3,183 16. On March 18th, 1872, William N. Galbraith was appointed his successor. Galbraith then accepted from his predecessor, in lieu of actual moneys exhibited as the balance due the wards respectively, the three bonds and judgments above referred to for his three wards, Matthew, John and Mary E., each for the sum of \$801 91. Galbraith, as guardian, subsequently collected the several

counts of the judgments in favor of his wards, Matthew and John Jack, and paid the same over to them on their attaining the age of twenty-one years respectively. He also collected seven years' interest on the judgment in favor of Mary E. Jack, the exceptant.

Mrs. Mary R. Ferguson, to whom the moneys of the wards were loaned, made and delivered a deed of voluntary assignment for the benefit of her creditors to William F. Beyer, Esq., the counsel for exceptant, of all her real estate, in which was included the Jack farm of one hundred and four acres, and another farm of some fifty-six acres, with improvements. The farm of fifty-six acres was owned by Mrs. Ferguson in 1871, when she purchased the other farm from the estate of John Jack, deceased. The farm of one hundred and four acres was sold in 1879 by the assignee for \$1,794 56, subject to the power, and the fifty-six acre farm in 1879 by the same person for \$1,512. These amounts comprised the whole fund in the hands of said assignee for distribution, there being no personal fund. The judgment in favor of the ward, Mary E. Jack, being a subsequent lien, was therefore not reached.

Galbraith, as guardian of Mary E. Jack, the exceptant, filed his account on February 7th, 1879, exhibiting a balance in his favor of \$47 45. In this account he took credit, *inter alia*, for the balance due on the judgment in favor of the ward, viz., \$357 94 as not collectible by reason of the insolvency of the defendant and the loss of the security taken by his predecessor. This account was presented for confirmation *nisi* March 17th, 1879, to which the exception in question was filed on the same day.

The auditor's conclusions will be found in the opinion of this court.

W. F. Beyer, for appellant.

J. W. F. Swift & George M. Kline, for appellee.

STERRETT, J. The mixed question of law and fact presented to the learned auditor and court below was whether the

appellee was justly chargeable with such negligence in the management of the trust funds committed to his care as should cast upon him the burden of the loss that was sustained.

The investment which proved to be insecure, and from which the loss resulted, was made by Mr. Davis, the first guardian of the four minor children of John Jack, whose administratrix settled her account in April, 1871. The distributive shares of the minors, amounting to \$801 94 each, were paid to the guardian, who loaned three of the shares to Mrs. Ferguson on judgment bonds, payable respectively as each minor came of age, with interest annually. About the same time he paid the remaining share to the eldest son who had then attained his majority. The account of Mr. Davis was settled and confirmed in March, 1872, and on his own petition he was discharged on paying "to his successor all money in his hands, with accrued interest thereon, belonging to the estate of said minors;" and on the same day the appellee who was appointed his successor in the guardianship took from him, as cash, an assignment of the three judgments against Mrs. Ferguson. Two of the judgments which matured respectively in 1873 and 1876, with interest thereon as it accrued, were promptly paid and properly applied. The remaining judgment, representing the share of Miss Mary E. Jack, the appellant, matured April 1st, 1877, to which date the interest was paid, and subsequently \$144 was paid on account of the principal. Mrs. Ferguson then became embarrassed, and made an assignment for the benefit of creditors, but the fund realized from the sale of her real estate proved to be insufficient to pay prior liens; and the residue of the judgment held by appellee was thus lost.

The auditor found that the appellee, in the performance of his duty as guardian, acted in good faith, under the advice of counsel learned in the law, and was not guilty of negligence in the management of the trust; that at the time he accepted the assignment of the judgments, two of which were afterwards paid, the security was such as careful and prudent men would have regarded as good and sufficient, and that the loss which ensued was caused by the extraordinary and unexpected depreciation in real estate which followed the panic of 1873. It

is not alleged by the appellant that there was any carelessness or mismanagement on the part of the guardian from which loss resulted, except in the single particular of accepting the judgment as cash from his predecessor in the trust; and the ground of complaint as to that is, that the judgment was not the first lien on the real estate.

In determining whether the act complained of was such as should render him liable for an unexpected loss resulting from an extraordinary shrinkage of values, especially of real estate in that neighborhood, all the facts and circumstances should be taken into consideration which seems to have been done by the auditor in this case. The investment was made by appellee's predecessor with special reference to appellant, payable when she came of age, with interest annually in the meantime, so that the fund might be constantly productive; and, notwithstanding the prior liens, the margin in the spring of 1872 was so much that the security was then regarded as safe and ample. Negligence cannot fairly be inferred from the fact that it ultimately proved to be insufficient. Many investments made about the same time by the most careful and prudent have resulted disastrously on account of the general depreciation of real estate during the years succeeding the panic. If the appellee had refused to take the judgment, and had insisted on payment in cash, in all probability considerable time would have elapsed before he could have found a safe investment for the money, and then the complaint might have been that he had refused a safe and permanent investment already made. The appellee was well acquainted with the property on which the judgment was a lien, and was competent to exercise a sound and reasonable discretion in regard to the sufficiency of the security. The auditor has found that in this, as well as in other respects, he acted in good faith and with ordinary care and prudence. It is, of course, a great hardship that the appellant should lose so large a portion of her small patrimony, but it would be a still greater hardship to compel her guardian to make good the loss unless it was occasioned by his carelessness. It has been said that the harshest demand that can be made in equity is to hold a trustee answerable for what was

never in his hands, or for a loss not caused by his willful default. In *Eyster's Appeal*, 4 Harris, 372, it is said; "If guardians are to be held responsible for all negligence, and are not allowed the exercise of a reasonable discretion and prudential care in managing the property of their wards, it will deter prudent men from assuming the office, which, in itself, is sufficiently onerous, and already undertaken by such men with reluctance."

While we regard the question in this case a close one and by no means free from doubt, we are of opinion that the conclusion reached by the auditor and the court below was correct, and that the decree should stand.

Decree affirmed, and appeal dismissed, at the costs of the appellant.

As to care required in making investments, see *Bowker v. Pierce*, *ante*, p. 109, and cases in note; also *Gilbert v. Welsch*, *infra*, and cases in note.

COPELAND, EXECUTOR *vs.* BARRON.

[72 Maine, 206.]

BEQUEST FOR LIFE WITH POWER OF DISPOSAL.

A testator bequeathed to his father and mother, and the survivor of them, a sum of money for their use and support, during the term of their lives; any part thereof remaining unexpended after their death, besides paying their funeral expenses and purchasing grave stones for them, to go to the testator's son. *Held*, that the legatees took a life estate, and not an absolute property in the money; that they are entitled to the custody and control of the money during their lifetime, or until used and expended for their support; and that the court could not interfere with their possession of it, unless in an extreme case of unfitness of the legatees to exercise the discretion committed to them, or in the case of a threatened wanton ill-use of the fund intrusted to their care.

BILL in equity brought to obtain a construction of the third item in the will of John Wilson Barron.

The item is recited in the opinion.

George W. Barron was deceased at the time of bringing the bill.

Thomas H. B. Pierce, for the executor.

D. D. Stewart, for defendant.

PETERS, J. The legacy in question is this: "3. I give and bequeath to my father and mother, George W. Barron and Betsey P. Barron, or the survivor of the two, the sum of one thousand dollars, to be paid to them from the proceeds of my life insurance, for their use and support during the term of their lives, and if any part of said sum shall remain unexpended after their death, besides paying their funeral expenses and putting up gravestones, the said remainder shall go to my son Wilson D. Barron."

The first question is, whether the primary legatees take the property absolutely, or only for life.

It is a well settled general rule, that, if a gift be absolute and entire in its terms, any limitation over afterwards is repugnant and void. A testator cannot divide an estate into more parts than the estate contains.

It is contended, by the primary legatees, that this bequest falls within this rule, upon the ground that the life estate first given and the power of disposition over the remainder afterwards added, combined in the same persons, constitute in such persons an estate in fee; that the two parts of the estate coalesce and merge into one, thus creating an absolute and unqualified gift.

But, upon two grounds, the bequest must be regarded as giving an estate for life only, with a power of disposal; and not an absolute property. First: Because the gift is not absolute and entire in its terms, the power of disposition annexed being qualified and conditional, and not an absolute power. Second: Because, if an estate is given for life in express terms,

it is not to be extended by implication arising from an annexed power of disposal, however qualified. Implication is admitted in the absence of, and not in contradiction to, an express limitation. (*Stuart v. Walker*, 72 Maine, 146.)

It is not probable that a testator would, in the same instrument, devise to a person an estate for life in express terms, and then give him the remainder of the same estate by implication. In *Popham v. Banfield*, Salkeld, 236, one of the earliest cases upon this question, the court said, "there was a mighty difference between a devise to A. and if he die without issue then to B., and a devise to A. *for life*, and if he die without issue, then to B. Where a particular estate is devised, we cannot, by any subsequent clause, collect a contrary intent, inconsistent with the first, by implication." In the case at bar, any other construction would deprive the words "during their natural life" of all meaning. These are words of limitation. The estate is not only a life estate, but is expressly limited to life. Had the power of disposal been absolute and unconditional, as it is not, even then it could not have extended the legal estate that vested in the first takers. The privilege of disposition is a collateral gift of power, and not a gift of property. The life estate and the remainder vested in the different devisees at the same moment. Nor can the remainder be prevented from coming to the possession of the ulterior takers except by a full exercise of the power to dispose of the gift. The case of *Stuart v. Walker*, 72 Maine, 146, embodies a reference to numerous authorities in support of this position; and the late case of *Herring v. Barrow*, L. R. 13 Ch. Div. 144, a case exactly in point, should be added to the list. See same case in L. R. 14 Ch. Div. 263.

Ramsdell v. Ramsdell, 21 Maine, 288, a leading case among the authorities touching the construction of wills, is appealed to by the primary legatees in defense of their position. There seems to be some misapprehension as to the true purport and scope of the rules imposed by that case. The following propositions are there stated: "It has become a settled rule of law, that if a devisee or legatee have the absolute right to dispose of the property at pleasure, a devise over is inoperative. But

where a life estate only is clearly given to the first taker, with an express power, on a certain event or for a certain purpose, to dispose of the property, the life estate is not by such power enlarged to a fee or absolute right; and the devise over will be good."

Where a devisee or legatee is spoken of in this language of that judgment, it has reference to cases where devises or legacies are made in general or indefinite terms, without words of limitation; as where I devise you my farm or give you my ship, describing the object given, but without stating the nature or *quantum* of the estate, or what its duration is to be; that being a matter of implication to be gathered from all parts of the will. And where a life estate is spoken of, it refers to a life estate arising by implication, and not to one expressly created or limited to life. It must be borne in mind that the discussion in that case related to a life estate created by a rule of the common law in force in this State prior to the statutes of 1841. The revised statutes of 1841 provided, that a devise of land should be construed to convey all the estate of the devisor therein, unless it appears by the will that he intended to convey a lesser estate. Prior to 1841, as to realty, the presumption was the other way. By the common law, a devise in general terms, without words of inheritance added, was not efficacious to convey an estate in fee; unless the intention of the testator to that effect could be collected from that in connection with all other parts of the will. A general devise, the interpretation of which was unaided by any light cast upon it from other portions of the will, carried a life estate by implication or by construction of law. An absolute power of disposal added thereto, being equivalent to the use of words of inheritance, would enlarge such life estate to a fee; while a qualified power of disposal would not have that effect. But now the opposite rule of construction or presumption prevails. Words of inheritance are now *prima facie* implied by a general or naked devise. From the nature of things, any power of disposal added to such a devise cannot extend it. It now only serves to emphasize and repeat the gift. But a limited or special power of disposal annexed to a general devise, with limitation

over, may restrain and limit the devise to the lifetime of the devisee. It is evident enough that the rules laid down in *Ramsdell v. Ramsdell*, do not apply to a life estate expressly created, where, as in the present case, the testator expresses his intention in direct and unambiguous terms.

It is asserted by the learned counsel for the persons who claim as ulterior takers in the present case, that the case of *Ramsdell v. Ramsdell*, even as understood by us, cannot stand against the opposing case of *Smith v. Bell*, 6 Pet. 68. But the latter case, in its advanced position upon this question, has not been followed in this State, and is contrary to the authorities generally. (Bigelow's Overruled Cases, 456; *Gifford v. Choate*, 100 Mass. 346; *Homer v. Shelton*, 2 Met. 201; *Albee v. Carpenter*, 12 Cush. 387.)

Another question is, whether the life legatees are entitled to the possession of the money bequeathed. We think they are. Had the testator bequeathed chattels instead of money, their right to the custody of the property, upon giving an inventory of it, would be unquestioned. But money may be limited over, as well as chattels. It has frequently been held that a bequest of money for life, and then over, gives only the interest. (*Field v. Hitchcock*, 17 Pick. 182; 1 Jarman on Wills [5th ed.], Bigelow's note, *879.) But in this case the legatees are to have not only the interest of the money, but are entitled to expend so much of the capital as may be required for their support. The legacy is payable directly to them by the terms of the will. The meaning of the bequest is, that the money (payable out of the insurance fund) goes to the legatees for their use and support, and not that it is to be paid to them as they may need it for their support. This construction is not prevented by the provision in the bequest that the funeral expenses of the first takers may be paid out of the fund bequeathed. Their own administrators may see to that. The estates of the legatees for life would be chargeable for any unexpended balance, and those expenses, if paid by their administrators, would make the charge upon their estates so much the less. (*French v. Hatch*, 28 N. H. 331.)

If it were a clear case of the unfitness of legatees to exer-

cise the discretion committed to them, or if it were shown that there was danger of a wanton abuse of the confidence reposed in them, a court of equity might, in a proper case for action of the kind, interfere in behalf of the remainderman. But no such question is presented. We are merely called upon to interpret a bequest in a will. The testator has not indicated a desire that his executor should retain and manage this fund. *Si voluit non dicit*. He provides for neither a trust nor trustee. He evidently relied upon the honesty and judiciousness of the legatees for a proper management of the money. He must have anticipated that they might freely expend it. The will does not provide that any of the fund shall be left for any purpose; it requires no unexpended balance; it merely provides for a remnant, if one is left. The testator has seen fit to place a personal confidence in his father and mother, which, without a change of circumstances, it would be unwarrantable in us to disrespect. If he trusts them, we cannot distrust them without sufficient cause. Our opinion is, that the fund, and any accumulations of it in the executor's hands, must be paid to the surviving legatee, Betsey P. Barron. (*Warren v. Webb*, 68 Maine, 133; *Starr v. McEwan*, 69 Maine, 334; *Sampson v. Randall*, 72 Maine, 109; 1 Rop. Leg. 315; 2 Red. Wills, 654, and note; *Johnson v. Goss*, 128 Mass. 433; *Shaw v. Hussey*, 41 Maine, 495, 502.)

It is claimed that the expense of this litigation should be assessed upon the legacy in dispute. The general rule is, that whenever the testator raises a doubt in regard to the meaning of his will, his general property must pay for settling it. (1 Red. Wills, 495; *Shepherd v. Beetham*, L. R. 6 Ch. D. 597.) It seems just and equitable, under the present circumstances, that each party should bear his own expenses and costs.

Decree accordingly.

See *Foot v. Saunders*, *ante*, page 73; *Stuart v. Walker*, *ante*, page 79; *Johnson v. Johnson*, *infra*; *Wetter v. Walker*, 1 Am. Prob. R. 519.

COOPER vs. POGUE.

[92 Penn. St. 254.]

DEVISE WHETHER FOR LIFE OR IN FEE.

A will contained the following clause; "To my beloved wife P. (so long as she remains my widow) I give all the income of the home farm, on which I now live, containing two hundred acres, more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom; also, the mansion house in which I live, together with all belonging to it, and all that is in it, or about it, I give to my beloved wife P., the same to be hers and to belong to her forever." *Held*, that the widow had a life-estate in the realty, limited further by the duration of her widowhood, and that she took the personalty absolutely.

ERROR to the Court of Common Pleas of Washington county.

Ejectment by George Pogue and others against Robert P. Cooper.

Robert Pogue, through whom both parties claimed title, died in 1860, leaving a will, the material portion of which is set forth in the opinion of the court.

Testator's widow, Sarah Pogue, survived him, did not marry, and died in the possession of the mansion house and home farm, devised to her by the will, on the 10th of November, 1876. They had no children. It was admitted on the trial, that the plaintiffs were the heirs-at-law of the husband, and that the defendant was one of the heirs of the wife, holding possession for himself and them. After giving evidence as to mesne profits, the plaintiffs rested, claiming to recover under the intestate laws. The defendant offered the will in evidence to show that Robert Pogue died testate, and, under the devise to his widow, the title to the disputed premises at her death vested in her heirs. The plaintiffs objected, on the ground that the will on its face did not carry a fee in the land to Sarah Pogue and away from the heirs-at-law. The court overruled the offer.

The defendant asked the court to admit the will and reserve the question of construction, stating his intention to

follow the will with extrinsic evidence. The court thought they must decide upon the objections, and suggested that the extrinsic evidence should accompany the offer of the will.

The defendant then, in connection with the will, proposed to show that "Robert Pogue bought the land in dispute March 3d, 1831, of Alexander Leiper; and that he married Sarah, his late widow, in the fall of that year; that he was a man of small means when he married, and that the estate he accumulated, was the result of their joint industry and frugality; that the mansion house thereon was not erected until 1845; that March 5th, 1840, the testator purchased about 100 acres of land in the same township, from the Everett heirs, for \$2,500, which farm he afterwards, shortly before his death, agreed to convey to George W. Pogue, one of the plaintiffs and executor of his will, in exchange for a tract of land in Whiteside county, Illinois, mentioned in the will, and the deed for the same to George W. Pogue was executed November 17th, 1859, three days after the making of his will by the testator; this for the purpose of showing the circumstances under which the will was made, in respect to the state or condition of the testator's property; and for the purpose of placing the minds of the court and jury as nearly as possible in the circumstances of the testator, when he made the devising clause which needs interpretation."

Plaintiff objected, that the will did not carry a fee to Sarah Pogue, and away from the heirs of Robert Pogue; and objected to parol evidence offered in connection therewith, because there was no latent ambiguity in the will, and because the meaning of the testator could not be explained by evidence outside of the will. Second, that the offer was incompetent and irrelevant.

"The court overruled the offer of the will and extrinsic evidence, directed a verdict for plaintiffs, and from the judgment entered thereon defendant took this writ of error."

A. W. & M. C. Acheson, for plaintiff in error.

D. F. Patterson & Alexander Wilson, for defendant in error.

MERCUR, J. This contention arises under a clause in the last will and testament of Robert Pogue. It is this: "to my beloved wife, Sarah Pogue (so long as she remains my widow), I give all the income of the home farm, on which I now live, containing two hundred acres more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom, also the mansion house in which I live, together with all belonging to it, and all that is in it, or about it, I give to my beloved wife, Sarah Pogue, the same to be hers and to belong to her forever."

The question is, what estate did Sarah Pogue take in the home farm and mansion house thereon?

In the clause quoted the words "I give" are used twice, once before the use and product of the real estate are devised, and once after the personal estate is specified. It begins by declaring, "to my beloved wife, so long as she remains my widow, I give all the income of the home farm * * * with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom, also the mansion house in which I live." If the clause ended here, there would be no reason to doubt either the intention of the testator or the legal effect of the devise. In clear and express language the income and profits of the lands were given to her only so long as she remained his widow. There is not only an absence of words necessary to pass a fee, but there is the express use of words giving a less estate. The gift is unequivocally limited to the time that she shall remain his widow. At the latest the interest devised ended at her death; but would end sooner in case of her marriage. While a devise of the income and profits of land is a devise of the land itself, yet it is a devise of it for no longer period of time than the testator gave the income and profits. *France's Estate*, 25 P. F. Smith, 220. The income and profits having been limited to the duration of her widowhood, her estate in the land was limited to the same period of time. She took an estate for life, because it might possibly last for life, but liable to be determined sooner, on the happening of the contingency of her marriage. 2 Black. Com. 121; 4 Kent's Com. 26; *Rodgers v. Rodgers*, 7 Watts, 15. It is not a devise

upon condition, nor one the object of which is to impose a penalty or forfeiture; but it is a conditional limitation which marks the extent of the duration of the interest given. *Bennett v. Robinson*, 10 Watts, 348.

The clause proceeds, "together with all belonging to it, and all that is in it, or about it, I give to my beloved wife, Sarah Pogue, the same to be hers and to belong to her forever." "It," manifestly refers to the mansion house stated in the preceding sentence, and the property in and about the house he gives to her. This evidently means personal property. How does he give it? Not as he has given the products of the land so long as she remains his widow, but "to be hers and to belong to her forever." The distinction is thus clearly made between the real and the personal estate. The former is given to her for life, the latter forever. This view gives effect to the letter and spirit of the will. It would be giving an unnatural interpretation to the clause to say the latter "I give" refers to the use and products of the lands. They had already been given in distinct and appropriate language. It would do still greater violence to the reading of the will to hold that the gift "to her forever," which following immediately after the personal estate, had any reference to that other property that he had just said she should have only so long as she remained his widow. As the last part of the clause reasonably and naturally applies to the personal estate only, we will not assume that it was intended to contradict the language he had used in regard to the real estate, nor to change the estate therein given. We see nothing obscure or ambiguous in the will. It does clearly appear therein, that the testator intended to devise to his wife, an estate in the land less than a fee. The fact that he did not devise the remainder is insufficient to overcome or change the effect of the language giving his wife a life-estate only. It follows that the parol evidence offered was insufficient to change its legal effect, and the title of the testator's heirs must prevail.

Judgment affirmed.

See Frey v. Thomson, *infra*; Stilwell v. Knapper, 1 Am. Prob. R. 211.

WOODFILL *vs.* PATTON.

[76 Indiana, 575.]

REVOCATION OF WILL.—MARKING OUT SIGNATURE BY PENCIL.

Under a statute that no will shall be revoked unless the testator, or some one in his presence directed by him "with intent to revoke, shall destroy or mutilate the same," the marking out, by testator, of his signature by pencil lines, coupled with the required intent, constitutes a revocation.

THE facts appear in the opinion.

C. A. Korbly & W. S. Friedley, for appellants.

E. R. Wilson & J. F. Bellamy, for appellees.

ELLIOTT, C. J. Appellants, by their complaint, affirmed that a will executed by Daniel Woodfill had been revoked; this the appellees by their answers denied. Upon this issue the case was tried. A special finding of facts was made and conclusions of law stated. The case comes to this court upon the exceptions to the conclusions at law stated by the trial court.

The material facts are substantially these: Daniel Woodfill, then a widower with five children, executed a will on the 2d day of March, 1869, and gave it to his son Clarence for safe keeping. Clarence then lived with his father, on what was called the home farm, which was by the will of his father devised to him. In February, 1872, the testator married Nancy Woodfill, one of the appellants. About the same time he became desirous of regaining exclusive possession of the home farm, and to accomplish this purpose he conveyed to John G. Woodfill the land which the will devised to three of his daughters, and to induce his son Clarence to surrender possession of the home farm, gave him the sum of one thousand dollars received from John G. Woodfill, for the land conveyed to him. The proposition made to and accepted by Clarence, and the facts occurring thereafter, are thus stated in the special

inding. The said Daniel Woodfill "proposed to Clarence, as an inducement for him to surrender the possession and use of said premises, to pay him said one thousand dollars in payment of notes mentioned in the first item of the will, amounting to \$500, and as an advancement of \$500 in part payment of his interest in the estate of his father; that Clarence accepted said offer, received the sum of \$1,000, \$500 in payment of said notes, and \$500 as an advancement, surrendered the possession of said farm, delivered up said notes to his father, together with said will and the other papers intrusted to him for safe keeping, and also gave his father a receipt, in these words, to wit:

" 'JEFFERSON COUNTY, INDIANA, Nov. 5th, 1872.

" 'Received of Daniel Woodfill the sum of five hundred dollars in part payment of my interest in the estate of my father, Daniel Woodfill.

(Signed)

" 'C. C. WOODFILL.'

" That said transaction took place about November 5th, 1872, and within a day or two afterward said Clarence C. Woodfill removed to the State of Kansas, where he bought land and remained two years; that, after said Clarence Woodfill had delivered said will to his father and gone from his presence, to wit, on the same day, he (the father) showed the will to his wife, and that his signature thereto was much blackened by a considerable number of parallel and circular lines and some cross-marks made by a common lead pencil, and drawn over and about said signature; that some of the smaller letters were wholly blackened thereby, but were yet discernible on a close inspection, and the said signature, as a whole, still remained quite perceptible and legible through said pencil marks; that his name in the attesting clause was in a similar condition, and that said pencil marks were so made by the testator with the intention of revoking said will, which fact is found by the court as an inference from the foregoing facts; that, after calling the attention of his wife to the condition of his signature thereto, he put said will away with his other papers; that at his death it was found in the aforesaid condition among his valuable papers, and that among the latter were also found the

notes paid to Clarence and taken up as aforesaid, but that from each of them his signature had been cut off and removed."

Following the finding we have quoted are statements showing the property owned by the testator at the time of his death, in September, 1876; the admission of the will to probate, and showing also the erasure of the pencil marks by the clerk of the Circuit Court after the will had been probated. The conclusions of law are stated in the following language: "And upon the facts found as aforesaid the court, as conclusions of law, finds that said will was not revoked, and the court, therefore, as a matter of law on said facts, finds for the defendants."

An important question of practice first requires consideration. It is necessary to determine what are the facts stated in the special finding. Appellants affirm that it is found as a fact, that the testator did revoke his will by drawing the pencil lines across his signature. The appellees meet this affirmation by the proposition, that, as they express it, "the court had no authority to conclude the appellees by stating its opinions, conclusions or inferences; and, if in this the court went beyond its province, all such opinions, conclusions or inferences are mere surplusage, and not binding upon the parties." This preliminary contention springs from the clause, "And that said pencil marks were so made by the testator with the intention of revoking said will, which fact is found by the court as an inference of fact from the foregoing facts." Counsel have not referred us to any adjudged cases, but have contented themselves with referring to the provisions of the statute, which reads as follows: "The court shall first state the facts in writing, and then the conclusions of the law upon them." 2 R. S. 1876, p. 174, sec. 341. This provision means, clearly enough, that the facts, and not the evidence, shall be stated. It has been repeatedly held that the facts, and not the evidence, shall be set forth in the special finding. In *Davis v. Franklin*, 25 Ind. 407, it was said: "The statute directs that 'the court shall first state the facts in writing, and then the conclusions of law upon them,' and when the finding attempts to go beyond this limit, and not only state the facts found, but the evidence upon which the

finding was based, we must regard the evidence as improperly on the record." In *Tousey v. Lockwood*, 30 Ind. 153, it was held that the finding should state the facts, and that a statement of the evidence was improper. The late case of *Kealing v. Vansickle*, 74 Ind. 529, declares the same general doctrine. In *Locke v. The Merchants National Bank*, 66 Ind. 353, it was said of special verdicts, that "It has often been decided by this court that the jury should not find the evidence, but the facts."

It is not always easy to discriminate between evidence and facts; the line of separation is often shadowy and indistinct. We think, however, that the statement in the finding of the court, as to the intention of the testator in making the pencil marks across his signature, is clearly the statement of a fact. Intention is almost always a fact to be inferred from evidence. Facts are occurrences or events; evidence the means by which the happening and the character of such occurrences or events are shown. It is said in *Locke v. The Merchants National Bank*, *supra*, that there are two kinds of facts—"evidentiary facts and inferential facts;" and the fact under immediate mention belongs to the latter class. It is such facts that the finding should set forth. The statement that the fact is inferred from other facts does not make the conclusion any the less "a finding of fact." The only possible way in which a conclusion of fact can be drawn from evidence is by the process of inference.

In order that there should be a valid revocation of a will there must be the concurrence of two things, the intention to revoke, and the act manifesting the intention. There is no question in this case as to the existence of the intention to revoke, for it is expressly found to have existed at the time the act, which it is contended worked the revocation, was done. The question, therefore, is whether the act was such as manifested and effected the intention in a manner authorized by law. There must not only be an act of revocation, but the act must be such as the statute recognizes as a proper manifestation of the intention to revoke. The act will not operate as a revocation, no matter how strongly and unequivocally it may show an

intention to revoke, unless it be such an act as the statute prescribe. Upon this point there is entire harmony. *Hunkle v. Gates*, 11 Ind. 95; *Woolery v. Woolery*, 48 Ind. 523; 1 Jarman's Wills (5th Am. ed.), 287, n.; 1 Redf. Wills, 306. There is some diversity of opinion as to the proper construction of statutes prescribing methods of revocation, but it is generally agreed that the statutes shall receive a strict construction, and that the case must be brought clearly within their provisions. Our statute upon this subject is as follows: "No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator or some other person in his presence, and by his direction with intent to revoke, shall destroy, or mutilate the same." 2 R. S. 1876, p. 576. The specific acts which, under former statutes and at common law, were essential to a valid revocation, as cancellation, burning and the like, are not required to be shown, although they would doubtless be sufficient under the present statute, if of such a character as to show a mutilation or destruction of the instrument.

It was the rule of the common law prior to the enactment of the statute of 1 Vict. ch. 26, that a deliberate obliteration of the signature operated to revoke the will, if made *animo revocandi*. Since the adoption of that statute, the English courts have held that there must be either a partial or total destruction of the paper or parchment upon which the words of the will are written, or a total obliteration of the words of the instrument. These cases are pressed upon our consideration, and we are earnestly asked to adopt them as our guides. The language of the English statute is not at all similar to ours. It is therein enacted that no will, codicil or any part thereof shall be revoked in any other manner than, in designated cases, by operation of law or by the execution of a new instrument, or "by the burning, tearing, or otherwise destroying the same." Under this statute it has been held that drawing a pen across the signature, or by erasing with ink other parts of the instrument will not operate as a revocation, if the signature or words can still be discerned. In one case the court directed the use of strong glasses in order to ascertain whether there was a complete erasure of the characters used in drafting the will. In

other cases it is held that nothing short of a destruction by burning or tearing will be an act of revocation within the statute. These cases are cited in the recent editions of Jarman on Wills and Williams on Executors, and we do not deem it necessary or useful to comment upon them, for the statute upon which they are based is so radically different from ours that they can have no bearing upon the question before us. In *Price v. Powell*, 3 H. & N. 340, Pollock, C. B., said that "Very little assistance is to be derived from the previous cases in construing the altered expression in the statute," and this we may say of all the English cases based upon the statute of Victoria.

The destruction of a will did not, at common law, imply the ruin of the paper or parchment on which the words were written. It meant taking from the instrument force and effect. The legal force of a will may be as effectually destroyed by erasures as by the destruction of the paper upon which it is written. Neither words nor sentences can have legal validity in and of themselves; the signature duly attested gives force and vitality to the instrument. It is often said a will speaks from the death of the testator, and it would be strange indeed, if a paper from which the signature is designedly taken, either by erasure, obliteration or by manual tearing, for the very purpose of preventing it from speaking, should ever be allowed to speak. We think the erasure of the testator's signature, designedly and deliberately made, accompanied, of course, by the intention to revoke, must be deemed a destruction of the will. It is not necessary that there should be destruction, in a literal sense, of the fabric upon which the words of the testator are written. It will be sufficient if the legal force of the instrument is divested or extinguished. It is not important what the form or character of the specific act is, provided it be such as takes from the will all force and vitality. The paper is of little or no consequence, save as the medium of preserving and expressing the purpose of the testator. If the signature of the maker of a promissory note was intentionally and rightfully erased, no one would hesitate to declare that the note was destroyed, although all else remained intact. If the grantor of a

deed should intentionally erase his signature, before an estate had vested thereunder, it is clear that the instrument could not be treated as a deed, because the taking from it of an essential part would work its legal destruction. It is, however, unnecessary to multiply illustrations, for it is plain that the force of a writing may be completely annulled by taking from it some essential and indispensable element of vitality.

If we should adopt appellee's theory, we should be compelled to construe the statute as limiting, rather than enlarging, the methods of revocation. This we cannot do without violating a familiar rule of construction. The language of the present statute is more general and comprehensive than that of the former. Unlike the English statute, it contains no restrictive or particularizing words. The language is, no will shall be revoked unless the testator "shall destroy, or mutilate the same," and embraces all acts amounting to a mutilation or destruction, whether the acts are such as former statutes or common law rules recognized as effective acts of revocation or not. Neither the term "destroy" nor the term "mutilate" should be given the narrow and restricted meaning for which appellee contends. "Mutilate" means something less than total destruction. Mere mutilation of a will would not, of itself, take from a will all legal force. A mutilation, however, which takes from the instrument an element essential to its validity, would have the effect to revoke it. To mutilate, in the sense in which it is generally used by law writers and by judges, means to render imperfect. We often find courts speaking of "records mutilated by erasures," and "records mutilated by corrupt interlineations." Nor is the use of the word in this sense made by courts and writers of law books alone, for it is often used in the same sense by the authors of literary works. We often encounter such expressions as, "The works of the great Stagirite have come down to us in a mutilated condition;" "The commentator has sadly mutilated Quintilian." Webster, as illustrative of the meaning of the word, quotes from Addison the following: "Among the mutilated poets of antiquity, there is none whose fragments are so beautiful as those of Sappho." Worcester defines the word as follows: "To deprive of

some essential part." Among the definitions given by Webster is the following: "To retrench, destroy, or remove a material part of, so as to render imperfect; as, to mutilate the poems of Homer, or the orations of Cicero."

Purposely taking from a will the signature of the testator deprives it of an essential part, and makes it so imperfect as that it loses all legal force and effect. The manner in which the mutilation or destruction is effected is not of controlling importance. If the signature were cut or torn from the paper; if all traces were removed by a chemical preparation, there would be no room for controversy, it would plainly be a mutilation of the will. It cannot be any the less a mutilation if the signature is marked out with pen, pencil or other implement which erases, cancels or obliterates it.

We are referred to the following passage in a writer of acknowledged ability: "Where a pencil instead of a pen is used, the cancellation is not necessarily ineffectual, but is always *prima facie* considered deliberative, and it must be shown that it was intended to be final." 1 Jarman's Wills (5th Am. ed.), 291. It appears in this case that the act was more than merely deliberative. The intention to revoke, and the cause from which the intention sprung, are shown by the fact that the testator's controlling purpose was to regain possession of the home farm. The final character of the act is revealed by the fact that part of the property upon which the will was designed to operate was sold, and that notes therein otherwise provided for were paid by the testator. The fact that the will was exhibited with the erasures upon it proves that deliberation was at an end. The design to revoke had been formed and executed.

The court erred in overruling the appellants' exceptions to the conclusions of law.

Cross errors are assigned which require us to determine the sufficiency of appellants' complaint. The appellees contend that the facts stated in the complaint do not show a revocation of the will. The allegations of the complaint upon this point are as follows: "And the plaintiffs allege that said Daniel Woodfill while in full life did revoke said will by obliterating his signature thereto, and by obliterating his name wherever it

appeared in the attestation clause thereunder written, thereby mutilating said will with the full intent to revoke the same." If we are right in our conclusion, that divesting a will of the framer's signature is a mutilation, then we must adjudge the complaint sufficient. We do so adjudge.

Judgment reversed, with instructions to enter judgment upon the special finding in favor of appellants.

Revocation by cancelling with pencil.—What are, and what are not, sufficient acts of revocation may usually be determined, in each of the States of the Union, by reference to the Statute.

It was held in England, *Mence v. Mence*, 18 Ves. Jr. 348, that cancellation with a pencil of all the disposing part of a will was effectual as an express revocation. But later a contrary doctrine was maintained in *Francis v. Grover*, 5 Hare, 89, where pencil lines drawn over ink are held to raise no presumption of revocation, and the same doctrine is found in *In re Hall*, L. R. 2 P. & D. 256.

A middle ground is taken in *Bethell v. Moore*, 2 Dev. & B. L. 311. Here it is held that the drawing of lines in pencil through a will, or any part of it, may be merely deliberative, or a final act of cancellation, and that whether it is to be held the one or the other, must be gathered from the contemporaneous or subsequent acts of the testator. This appears to be the proper rule. 2 Greenl. Evidence, § 681.

A will written and signed in pencil is entirely valid. *In re Dyer*, 1 Hag. Ec. 219; *Rhymer v. Clarkson*, 1 Phil. R. 1; *Dickenson v. Dickenson*, 2 Phil. R. 178. The same rule is established in Pennsylvania. *Myers v. Vanderbilt*, 84 Penn. St. 510; *Main v. Ryder*, Id. 217. But a writing on a slate, purporting to be a last will and testament, is not admissible to probate. *Reed v. Woodward*, 11 Phila. (Pa.) 541.

ORMISTON vs. OLCOTT, EXECUTOR.

[84 New York, 339.]

INVESTMENT OF FUNDS OUTSIDE JURISDICTION OF COURT.

seems that investments by executors or testamentary trustees which take the funds out of the jurisdiction of the court, will not be sustained and are made at the peril of the investor. The case must be rare and the circumstances unusual and peculiar to make an exception to this rule.

The rule relates only to voluntary investments by the trustee, and does not govern a case where, by act of the testator, a foreign investment has been made, or where, without the fault of the trustee, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. The rule that each of several co-executors is only liable for his own acts, and cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein, applies as well where the executors are also trustees.

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, reversing an order of the surrogate of the county of Otsego, which denied the petition of the plaintiff that defendant be held personally liable for unpaid interest on securities taken by him as executor and trustee.

The facts as conceded and found are substantially as follows :

Robert Ormiston, late of the town of Springfield, in the county of Otsego, died, leaving a last will and testament, which was admitted to probate by and before the surrogate of said county of Otsego, wherein defendant, Horatio J. Olcott, Oliver A. Morse and William M. Oliver, were named as executors hereof and trustees of the estate, which was given to them in trust, to pay the rents, issues and profits to James Ormiston, the petitioner, and Agnes Ormiston, his wife, during their lives and the life of the survivor of them, and, upon their deaths, to pay the principal to the grandchildren of the testator. Letters testamentary were issued to said persons, and they took upon themselves the execution of the trust on or

about the 4th day of December, 1842. William M. Oliver died on or about the year 1863. Oliver A. Morse died on or about the 19th of April, 1870, leaving said Olcott the only survivor of said trustees. On or about the 23d day of February, 1876, an accounting was had by said Olcott before the surrogate as such executor and trustee, and such proceedings were had that there was found in his hands \$11,071 09. Olcott did not pay the interest or income to the *cestui que trust* for the year ending the 1st day of April, 1879, except the sum of \$200. Agnes Ormiston, wife of the petitioner, died about November 7, 1876, and the petitioner is entitled to the whole of the income. Oliver A. Morse, during his lifetime, had and received all the assets and proceeds of the estate, and had the entire charge of the same. After the death of Morse, in April, 1870, Olcott made an examination of the matters of said trust in the hands of Morse, and found that much of the assets had been invested and lost or converted by said Morse and mingled with his own funds. He thereupon, for the purpose of restoring said fund, and, as he swears in his answer, and as the surrogate found, in good faith and "in the full belief that it was the best possible arrangement to secure the fund," took from the executors of Morse an assignment of a bond and mortgage upon unincumbered real estate situate in the city of Toledo, in the State of Ohio, for \$12,500, which mortgaged premises at that time were of a market value greatly exceeding the amount of the mortgage, as estimated by competent judges, and were considered to be first class security for the amount of said mortgage. He also took other and additional securities as collateral, and, to further protect said trust and secure its payment, he took from Anna Morse, the widow and sole legatee of Oliver A. Morse, and who was then good and responsible, a guaranty of the payment of said mortgage at maturity. After taking said mortgage, Olcott, on notice to all parties interested, duly rendered an account to the surrogate, of the said trust fund, whereon it appeared that the same was invested in the aforesaid mortgage, secured as aforesaid. Said account was accepted by the surrogate, and was not objected to by any of

the parties interested. The petitioner was present and represented by counsel at the time of such accounting.

Olcott alleged and the surrogate found that the mortgagors in said mortgage have become insolvent, and by reason thereof the said Olcott has not been able to collect the interest thereon, and that he believed it would not be good policy, or for the interest of the said fund, or the parties interested therein, to foreclose said mortgage in the present depressed state of values of real estate, and was advised that if he should do so it would result in loss. That, by reason of his not having received any income or interest from said fund, he has not been able to pay over any interest or income due April 1, 1879.

The surrogate, upon the foregoing facts, made an order or decree denying the prayer of the petitioner, and adjudging that said Olcott is not guilty of such wrong-doing as renders him personally liable for any loss which results from his inability to collect the said mortgage or the interest thereof.

The General Term reversed this order or decree of the surrogate, and ordered that the prayer of the petitioner be granted.

Samuel A. Bowen, for appellant.

H. Sturges, for respondent.

FINCH, J. Our own study of this case, and the very careful researches of the counsel by whom it was argued have alike failed to discover any judicial decision, or any legislative enactment, which directly and in terms declares as the law of this State, that an executor or testamentary trustee may not invest the funds in his custody, under any circumstances, in good mortgages upon real estate situate outside of the State. And yet the general drift of authority and considerations relating to the safety of trust funds seem to require that such should be regarded as the general rule, and that investments beyond the jurisdiction of the court should not be sustained unless in very rare and exceptional cases, and under very unusual and peculiar circumstances. The rule should not be made arbitrary and inflexible, and so rigid as to admit of no possible exceptions, for

it is merely an outgrowth or consequence of the broader and admitted proposition that the duty of a trustee in making investments is to employ such diligence and such prudence as, in general, prudent men of discretion and intelligence in such matters employ in their own like affairs. (*King v. Talbot*, 40 N. Y. 76.) While, therefore, we are not disposed to say that an investment by a trustee in another State can never be consistent with the prudence and diligence required of him by the law, we still feel bound to say that such an investment, which takes the trust fund beyond our own jurisdiction, subjects it to other laws and the risk and inconvenience of distance and of foreign tribunals, will not be upheld by us as a general rule, and never unless in the presence of a clear and strong necessity, or a very pressing emergency. The cases in our courts have quite clearly recognized the rule that an executor must invest in government or real estate securities (*Ackerman v. Emott*, 4 Barb. 626); but apparently no occasion has arisen until the present to determine the effect of such an investment made beyond our jurisdiction. It would often be unjust to beneficiaries to compel them to accept such investments, and tend to increase the risk of ultimate loss. The proper and prudent knowledge of values would become more difficult and uncertain; watchfulness and personal care would in the main be replaced by confidence in distant agents, and legal remedies would have to be sought under the disadvantages of distance, and before different and unfamiliar tribunals. We do not hesitate, therefore, to recognize and declare as the general rule that the trustee who invests beyond the jurisdiction does so at the peril of being held responsible for the safety of the investment. But this rule relates only to voluntary investments by the trustee, having the fund in his hands and full opportunity and freedom of choice, and does not govern a case where, by the act of the testator, a foreign investment has been made; nor a case where, without the fault of the executor, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. The question at bottom is in every instance the prudence and diligence of the executor, and that always must be measured, and may be modi-

by surrounding circumstances. In the present case, the General Term have treated the Ohio mortgage taken by the executor as a voluntary investment of trust funds beyond the jurisdiction. We do not concur with that view of the facts. The assets of the estate had all passed into the possession of the executor, Morse, and the defendant had taken no part in their possession or management. Upon the death of Morse, the defendant became sole surviving executor, and, as in duty bound, sought to reclaim the remaining assets. He found none remaining as such, and a personal liability substituted by the act of Morse and not by his own. He found that his associate executor had mixed such assets with his own property, partially converted them to his personal use, and in part lost them by unsafe investments. We do not know as a fact that the estate of Morse was insolvent, nor can we be certain that it was solvent. One thing, however, is quite apparent. The trust funds had been practically absorbed in the estate of Morse, and had been changed into a debt due from that estate. The duty which devolved upon the surviving executor and which he proceeded to perform was one, not of investment, but of collection. He stood in the presence of an emergency which required him to do, not so much what he preferred, as what he could. He swears in his answer that what he did was done in good faith and "in the full belief that it was the best possible arrangement to secure the fund from the estate of Morse." He took from that estate a bond and a mortgage on real estate in Toledo, which was assigned to him by Morse's representatives, and guaranteed by the widow who was sole legatee, and at that time solvent, and also further collaterals for greater safety. The surrogate in his decree finds these facts to be true, and they stand wholly uncontradicted. The situation, therefore, is plain. The estate of Morse could not raise and pay the ready money. The surviving executor was shut up between two alternatives. He must either present his claim, await the slow process of administration, take all the chances of the solvency of the estate, run every risk of the honesty and prudence of its administration and of possible sacrifices, and trust to the tight watch possible over affairs transacted by others, or he

must accept the securities offered, at the time perfectly good, and having no fault except that in part they were beyond the jurisdiction. If the estate of Morse was solvent the guaranty of the sole legatee held its entire surplus, and if insolvent a good security for the full amount was better than a partial and uncertain dividend. We have no difficulty in concluding that it was defendant's duty to accept the securities offered, and that his omission to do so would have been imprudent and unwise. Nor do we hesitate to say that his action does not come under the rule which forbids a foreign investment. To hold that it does would establish a perilous precedent. It might hamper the collection of debts by trustees and executors due in foreign States, and drive them to refuse ample security and thereby encounter grave risk of loss. We are of opinion, therefore, that the defendant violated no rule of prudence in taking the security objected to, and should not be made personally liable for so doing.

Two other grounds were presented on which, it is alleged, such liability can be sustained. It is admitted that up to the death of Morse, the defendant, although co-executor, took no part in the management of the trust. It is claimed that this was negligence which rendered him liable for the misconduct of Morse. It is not disputed that the rule applicable to executors, as such, is that each is liable only for his own acts, and one cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein. (*Sutherland v. Brush*, 7 Johns. Ch. 22; *Monell v. Monell*, 5 Id. 283; *Manahan v. Gibbons*, 19 Johns. 427.) It is claimed, however, that the rule is more stringent where executors are also trustees, and the case of *Bates v. Underhill* (3 Redf. 365) is brought to our attention. The decision in that case is rested wholly on the English rule, which is not so rigorously enforced in this country. (Hill on Trustees, 309, note 1; Story's Eq. Jur. § 1280.) The authorities in this State do not justify the distinction sought to be made. (*Banks v. Wilkes*, 3 Sandf. Ch. 99; *Kip v. Deniston*, 4 Johns. 23; *Kirby v. Turner*, Hopk. Ch. 330; *De Forest v. Fulton F. Ins. Co.* 1 Hall, 130.) There would be neither wisdom nor justice in a rule which would

practically end in making a trustee a guarantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit and could not prevent.

It is further urged that the executor was negligent in continuing the investment, and in not collecting it from the debtors, and the decree of the surrogate at the close of the executor's accounting is said to have been disobeyed. Assuming that the executor had the right to take the mortgage, he certainly could not have collected it until it was due. It does not appear when that period arrived. It does appear, however, that in December, 1875, the executor rendered an account before the surrogate in which the investment in question was plainly set forth and described, and to which neither the surrogate nor the plaintiff made any objection. The decree which directed the executor to "retain" and invest the fund merely followed the direction of the will. It is probable that the mortgage has become due, and at all events there is interest unpaid. The executor explains that he has not foreclosed on account of the depressed values of real estate. His duty is to foreclose, but he must be allowed the reasonable discretion of an ordinarily prudent man in the choice of a time and occasion. We cannot say that he has been so negligent, in this respect, with the little knowledge furnished us as to the facts, as to have become liable for the amount of the trust fund. The case furnishes no accurate statements from which we can measure the length of the executor's delay since a foreclosure was possible, and gives no proofs tending to discredit the truth of his explanation or throw doubt upon the soundness of his judgment. We cannot as yet know that an ultimate loss will, in fact, result, and would not be justified in assuming it to be certain, and, on the present state of facts, charging the executor with the whole fund. The duty of an executor is difficult and delicate, and somewhat perilous even under favorable circumstances. And while no rule of proper responsibility should be relaxed, yet where he acts honestly and in good faith, and with reasonable prudence and discretion, he should not be held liable for unfortunate results which he could not be expected to foresee and was powerless to prevent.

The order of the General Term should be reversed and that of the surrogate affirmed, with costs.

All concur, except FOLGER, Ch. J., dissenting, and RAPALLO, J., absent; ANDREWS, J., concurring in result.

Ordered accordingly.

As to care required in choosing investments. See *Bowker v. Pierce*, *ante*, page 109, and cases in note; *Gilbert v. Welsch*, *infra*, and cases in note.

HOLMAN *vs.* PRICE.

[84 North Carolina, 86.]

LEGACY.—HOW DIVIDED.—PER CAPITA.

A testator directed the proceeds of certain real estate to be "equally divided as follows:" one share to one daughter absolutely; one share to three other daughters, minors; and one share each to two other daughters during their natural life. *Held*, that the infant legatees are each entitled to an equal share with the others.

ACTION for the construction of will. The defendant appealed from the ruling and judgment of the court below.

J. M. Clements, for plaintiffs.

J. A. Williamson & W. H. Bailey, for defendants.

SMITH, C. J. Moses Wagner on July 8th, 1866, made his will in which after a devise of the land whereon he resided to his wife for life and a bequest of certain personal estate, are contained these clauses:

Item 4. "I will and bequeath that my daughters, Amanda, Anna and Clara, shall receive a good English education at the cost and charge of my estate before the division takes place, which is provided for hereinafter."

Item 5. "I will all my real estate, not devised to my wife, to be sold by my administrator as soon as is practicable after my decease, and also all the land willed my wife in like manner to be sold after her death by my administrator, and the proceeds of sale shall be equally divided as follows, to wit, one share to Melinda, wife of McDonald Van Eaton, one share to Amanda Wagner, Anna Wagner and Clara Wagner, and one share to the sole and separate use of Margaret, the wife John H. Allen, free of any control of her said husband, the said Margaret to have and enjoy the interest accruing from the same during her natural life, and after her death to be divided among her children or their issue, if any be dead. And in like manner I will and devise one share thereof to the sole and separate use of my daughter Mary Ann, wife of Marion Van Eaton, free of any control of her husband, to receive and enjoy the interest accruing from the same during her natural life, and after death, the same be divided among her children or their issue, if any be dead."

Item 6. "After the payment of my debts, and the legacies, costs and charges of executing my will, I will that the proceeds of all notes or other evidences of debt due me, also all moneys on hand and the proceeds of sale of all personal property sold, and not herein specifically bequeathed, and all the residue of my estate, real, personal and mixed, I will and bequeath that the said fund shall be divided in the same manner among my children, as the moneys arising from the real estate, and devised in the 5th item of this will, and subject to the same conditions in all things and especially that the shares willed to my daughters, Margaret and Mary Ann, shall entitle them to receive the interest on the same during their respective lives, to their sole and separate use, free of the control of their said husbands; and after the death of each of them the shares to descend to their children in the same manner as is set forth as to the real estate in the 5th item."

In the 7th item the testator directs the sale of certain mill property and a similar disposition of the proceeds of his other estate. At the date of execution of the will the six daughters mentioned in it were living, and those who were married had

removed, and were residing beyond the limits of the State. Two of them, Margaret and Mary Ann, died during the lifetime of their father, leaving issue, and he died in July, 1875. The three younger daughters, Amanda, Anna and Clara, were minors and living with their parents when the will was made.

The controversy is as to the proper construction of the clauses which distribute the funds produced by the sales among the legatees, and especially whether the unmarried daughters take an equal share each with their older sister and the successors to the shares of those deceased, or together take a single and equal share to be divided among them. His Honor was of opinion that Amanda, Anna and Clara were entitled to one-sixth each of the distributable estate and an equal share with the others, and in this interpretation we concur.

Wills are so diversified in form and expression, written often in haste and by persons not skilled in the accurate use of language to convey the meaning of another, that the court can seldom derive much aid from the examination of adjudicated cases, and hence the necessity of general rules as guides in the difficult task of arriving at and giving proper legal effect to the instrument. A leading principle in the interpretation of wills is to ascertain and recognize the general pervading purpose of the testator and to subordinate thereto any inconsistent special provisions found in it. This principle was pressed into service and carried to its extreme limits in the recent cases of *Lassiter v. Wood*, 63 N. C. 360, and *Macon v. Macon*, 75 N. C. 376. In the former, Reade, J., employs this language, which in the other is cited and approved: "It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator, as gathered from his will, is always to be carried out by the court, and minor considerations, when they come in the way, must yield. Especially is this so when the purpose is *in consonance with justice and natural affection.*"

A fair and equal distribution of his estate among his children, with restrictions upon the shares of two of his married daughters, is the manifest predominant intent discovered in the will of the testator. To effect this object the three young-

er remaining under his roof, are to have "a good English education at the cost of the estate," as, we must infer, had already been furnished to the three older who had left.

The funds, when discharged of this imposed obligation, are then to be "*equally divided*, as follows, to wit: One share to Melinda wife of McDonald Van Eaton, one share to Amanda Wagner, Anna Wagner and Clara Wagner, and one share to the sole and separate use" of the other daughters respectively with contingent limitations over. The proper construction of the terms of the bequest to the minor children, inserted between the absolute gift to one and the restricted gift to the two other married daughters, is, that they are to take distributively as the others take and in the same sense as if the word "each" had been added after their names.

These daughters are grouped together, not to make a joint bequest to all, but because there was nothing peculiar in their social or personal relations to separate them as objects of the bounty to be provided by the common parent. This is not a strained interpretation of the words in their connections and is most obviously necessary to carry out the general intent of the testator. Why, it may be asked, should the father give those unprotected daughters equal opportunities for mutual improvement with their older sisters, and then to cut down each in the general division of the estate to one-third only of the shares which the others are to receive? This is not in harmony with that sense of moral duty and parental affection for all his children alike, so strongly impressed upon the instrument itself and indicating an intent to make his bounty equal to each.

We, therefore, hold that the legatees, Amanda, Anna and Clara, are entitled to an equal share each with the others, and that the one share prefixed to their names was intended to be and is, a bequest of one share to each of them.

There is no error and we affirm the ruling of the court below.

No error.

Affirmed.

MARTIN, EXECUTOR vs. MARTIN.

[181 Mass. 547.]

DEVISE "IN CONSIDERATION" OF TESTATOR BEING CARED FOR.

A devise "in consideration" of the testator being taken good care of and well treated by the devisee and her husband for the remainder of the testator's life, is not a devise on condition; and failure of the consideration will not defeat or avoid the will.

APPEAL by the heirs at law of John Martin from a decree of the Probate Court, allowing his will, which appointed Joseph Martin the executor, and contained the following clause:

"In consideration of being taken good care of and being well treated during the remainder of my life by my nephew Joseph Martin and his wife, I give, bequeath and devise unto Mary B. Martin, wife of said Joseph Martin, all the estate, both real and personal, of which I shall die possessed, to have and to hold the same to said Mary B. Martin and to her heirs and assigns forever."

The reasons of appeal assigned were, that the will was on condition that the testator should be taken good care of and well treated during the remainder of his life by Joseph Martin and Mary B. Martin, his wife; that they did not perform the condition, but from the time of the making of the will up to the death of the testator they treated him with harshness and cruelty; that they greatly neglected him, and deprived him, among other things, of necessary and proper food and nourishment, and of proper care and medical attendance during his sickness; and that they knew of the provisions of the will, at the time it was executed, and of the condition attached to the provisions therein.

The appellee filed a demurrer to the reasons of appeal, on the ground that they were not sufficient in law to sustain the appeal, or to avoid and defeat the will.

At the hearing in this court, the decree of the Probate

Court was affirmed; and the appellants appealed to the full court.

C. W. Richardson, for appellants.

W. D. Northend, for appellee.

GRAY, C. J. This case requires no particular consideration of the question under what circumstances the happening of a condition or contingency, upon which a will declares that it shall take effect, may be a subject of inquiry on the offer of the will for probate; because, in the will before us, the maintenance of the testator for the rest of his life is clearly not intended to be a condition or contingency upon which the validity of the will shall depend, but is mentioned only as the consideration or motive inducing him to make it; and failure of the consideration could not defeat or avoid the will, without a cancelling or revocation by the testator. *Damon v. Damon*, 8 Allen, 192; *Cohwell v. Alger*, 5 Gray, 67.

Decree affirmed.

See *Hammond v. Hammond*. *ante*, p. 119, and references in note; *Livingston v. Gordon*, *infra*, and note.

WELSH, EXECUTOR vs. BROWN.

[48 New Jersey Law, 37.]

FROM WHAT TIME INTEREST RUNS ON LEGACIES.

Interest on general legacies runs from the expiration of a year after the testator's death, unless the will clearly expresses an intention that it shall be computed from an early date or event.

A legacy to a minor child; or in satisfaction of a debt; or a bequest of an annuity or of a residue in trust to pay the income to a legatee for life, with a gift of the principal over, are exceptions to the rule and bear interest from the testator's death.

A legacy of a specific sum of money—the interest whereof is payable annually to

one for life—the principal being payable after his death to another person, is not an exception to the general rule.

Distinction stated between an annuity and legacy of a specific sum, the income of which is payable to a life tenant with a gift over of the principal.

CATHERINE WELSH died on the 22d of April, 1874. By her will, dated April 20th, in the same year, she made to the plaintiff the following bequest :

“I do give and bequeath to my niece, Aletta Brown, my gold watch, my melodeon, my black ear rings, my black furs, one set silver teaspoons (second choice), my cashmere shawl, my brown silk dress, and the interest of twenty-five hundred dollars, to be paid to her annually by my executor; and at her death the said sum of twenty-five hundred dollars shall be paid to or divided equally among any child or children of hers that may then be living, or their heirs; but if the said Aletta Brown shall die leaving no children or grandchildren living, then I do order the said sum of twenty-five hundred dollars divided equally among my heirs. I also give her all my mourning clothing.”

She also gave sundry pecuniary legacies and specific legacies of personal property to different legatees, after which the will contained the following provisions :

“I do order that none of the legacies or interest herein given or bequeathed shall be due or payable during the lifetime of my mother, but that all interest that may accrue or become due on any obligations belonging to my estate shall be used for the comfort and support of my mother; and if said interest is not sufficient, then I do order my executor to pay out of my estate such sum as may become necessary for the support of my said mother and for her burial.”

She further orders and directs as follows: “I do order and direct that all taxes that may be levied or assessed on any money or interest herein bequeathed or given away shall first be deducted from the said money, and the balance paid, and said money or interest shall be subject to the taxes as long as it remains in the hands or control of my executor. * * * I do order and direct that, after putting at interest a sum sufficient to pay the interest, and paying the legacies herein be-

queathed, and after settling my estate, if any balance shall be found due my estate or in the hands of my executor, he shall then divide such sum, share and share alike, among my heirs."

This action was brought by Miss Brown, the legatee, against the executor of the deceased, to recover \$175, one year's interest on the said sum of \$2,500, accruing between the 22d of April, 1874, and the 22d of April, 1875. The defendant demurred to the declaration, and the question designed to be raised by the demurrer was, whether, under the bequest to the plaintiff, she was entitled to interest on the said sum of \$2,500 from the death of the testatrix, or from the expiration of one year from that event.

This question the court below decided in favor of the plaintiff below. Hence this writ of error.

Alfred Mills, for plaintiffs in error.

S. B. Ransom, for defendant in error.

DEPUE, J. In determining as of what time legacies shall take effect and be payable, certain general rules have been adopted; and testators, in making their wills, are considered as framing their testamentary dispositions in view of those general rules.

Specific legacies are treated as severed from the bulk of the testator's property by the operation of the will, and their increase and emolument are regarded as specifically appropriated for the benefit of the legatee from that period; though the time for the enjoyment of the principal may be postponed to a future period. With respect to general legacies, the law, for convenience, has prescribed, as a general rule, that where no time is named by the testator, and in the absence of any intention derived from the will itself, such general legacies shall be raised and satisfied out of the testator's estate at the expiration of one year next after his death. (2 Roper on Leg. 1245; 2 Lead. Cas. in Eq. 639, notes to *Ashburne v. MacGuire*.) On a legacy coming within the class of general legacies, if the legacy be not paid at the expiration of the year, interest from

that time will be allowed as damages; and interest on a legacy will not be computed from a period prior to that time, unless there be a clear expression of intention that interest shall be reckoned from an antecedent time or event. In that case the interest is regarded as of the substance of the gift, and is not recoverable, as such, unless there be a clear intention apparent on the face of the will that interest shall be payable from a period prior to the expiration of the year.

To this general rule there are a few well-established exceptions. A legacy given in satisfaction of a debt will carry interest from the testator's death. (*Clark v. Sewell*, 3 Atk. 99.) Interest on a legacy to a minor child of the testator, or to one to whom the testator is *in loco parentis*, will be allowed from the testator's death as a provision for maintenance, where no provision is made by will or otherwise for the support of such legatee. (*Brinkerhoff v. Merselis*, 4 Zab. 680; *Cox v. Corkendall*, 2 Beas. 138; *Hennion's Ex'rs v. Jacobus*, 12 C. E. Green, 28; *Ex'r of Kearney v. Kearney*, 2 C. E. Green, 59, 63, 504.) Where the bequest is of an annuity, in the absence of any direction to the contrary, the annuity will commence from the death of the testator, and the first payment become due at the end of the first year from that event. In this respect an annuity differs from a general legacy; for a general legacy, not being payable out of the testator's assets before the end of the year from the testator's death, no interest will be due thereon until the expiration of the second year. (2 Rop. on Leg. 1245.)

There is another class of cases which are apparently exceptions to this general rule; but those cases stand upon peculiar and special grounds, and are regarded as a class by themselves. On a bequest of the residue of the testator's estate, or of some aliquot part or proportion thereof, in trust to pay the interest or income to a legatee for life, with a gift of the principal over at his death, the interest or income payable to the life tenant will be computed from the testator's death. (*Green v. Green*, 3 Stew. 451; s. c. 5 Stew. 768; *Van Blarcom v. Dager*, 4 Stew. 783; 2 Spence's Eq. Jur. 552-569; *Howe v. Earl of Dartmouth*, 7 Ves. 137, and the notes to that case in 2 Lead. Cas. in Eq. 686 *et seq.*) Cases of this class are distinguished

from legacies of a definite sum with remainder over, with respect to the computation of interest to the life tenant. (2 Wms. on Ex'rs, 1391; *Fearns v. Young*, 9 Ves. 549, per Lord Eldon; *Baker v. Baker*, 6 H. of L. Cas. 623, per Lord Chelmsford; *Van Blarcom v. Dager*, 4 Stew. 783, per Dodd, J.) In the case last cited, the computation from the testator's death of interest or income to the life tenant, where the gift is of the residue, is placed on a special equity as between the parties who are to participate in the gift, arising from the injustice that would be done to the life tenant by the addition of the entire interest to the capital. (2 Rop. on Leg. 1320.) That the computation of interest as between the life tenant and remainderman, where the *corpus* of the gift is the residue of the testator's estate, is founded exclusively on the special equity between the parties among whom the gift is to be apportioned, is apparent from an examination of the cases. For the first year, sometimes, the interest on the whole income is allowed the life tenant; sometimes only a portion of the income for the first year is allotted to the life tenant, and the balance is added to increase the capital, for the reason that, in such cases, the circumstances are such that it would be inequitable to the remainderman to give the whole produce of the first year to the life tenant; and sometimes the allowance to the life tenant for the first year is upon a *percentage* determined by the court, on a consideration of what would be just and equitable as between the parties, under the circumstances of the particular case. (*Hewitt v. Morris*, 1 Turn. & Russ. 241; *Fearns v. Young*, 9 Ves. 552; *Brown v. Gellatly*, L. R. 2 Ch. App. 751; 2 Spence's Eq. Jur. 558 *et seq.*)

The apparent conflict in the decisions on this subject is in a large measure due to the failure to observe the special grounds on which the computation of interest is made as between the life tenant and remainderman, where the *corpus* of the gift is the residue of the testator's estate. Some of it is also attributable to expressions used in that class of cases where interest is allowed by way of maintenance for minor children, or those to whom the testator is *in loco parentis*. If those cases which are universally considered as exceptional, and as resting on

special and peculiar grounds, are put aside, the decisions on the subject of interest on legacies are quite consistent and harmonious.

The contention upon which the judgment below is sought to be sustained is, that the gift to Miss Brown is of an annuity, and that the intention of the testatrix to pay her interest from her death is to be deduced from the language of the bequest.

An annuity is defined to be a yearly payment of a certain sum of money. (2 Wms. on Ex'rs, 809; *Booth v. Ammerman*, 4 Bradf. Sur. R. 129.) The first payment of an annuity given by will is due at the end of one year from the testator's death. This is one of the exceptions to the general rule with respect to the enjoyment by a life tenant of the benefits given by will. Where a general legacy is given to one for life, with remainder over to another, no interest will be due until the expiration of the second year. (2 Rop. on Leg. 1253.) This distinction between an annuity and a legacy for life with remainder over, was taken by Lord Eldon in *Gibson v. Bott*, 7 Ves. 89, 96. His language is: "If an annuity is given, the first payment is paid at the end of one year from the death; but if the legacy is given for life, with remainder over, no interest is due till the end of two years; it is only interest on the legacy, and until the legacy is payable there is no fund to produce interest." Mr. Roper approves of this distinction as founded on principle, and, speaking of the disposition of a sum of money and the interest of it given as an annuity to one for life, says that the annuity, being given in the form of interest upon a gross sum of money to be taken out of the assets as any other legacy, cannot be payable sooner than the fund produces the means for that purpose. (2 Rop. on Leg. 877.)

In the present case the gift to the plaintiff is of the interest on a gross sum—\$2,500—to be paid to her annually by the executor; and after the plaintiff's death the principal sum is payable to other parties. The will provides that the executor, after putting out at interest a sum sufficient to pay the interest and legacies bequeathed, shall divide the residue among the heirs of the testatrix. It further directs that all taxes on the money or interest bequeathed should first be deducted, and the

balance only paid, and that the said money or interest should be subject to the taxes as long as it remained in the hands or under the control of the executor.

In substance the bequest is to the executor to invest and pay over the net income or interest, after deducting taxes, to the life tenant during her life, and after her death, to pay the entire principal to the legatees in remainder. The executor, in the administration of the estate as executor, was under no obligation to set apart the principal sum on which interest was allowed until the end of the first year; and until that separation was made, there was no fund to produce interest for the life tenant. In legal effect the bequest is analogous to those in *Lowndes v. Lowndes*, 15 Ves. 301, and *Raven v. Waite*, 1 Swanst. 553, upon which interest was allowed only from the expiration of the year. In my examination of the English cases, I have not found a single decision in which a bequest similar to that under consideration, has been considered as excluded from the general rule that the legacy shall, for such purposes, take effect after the lapse of the year. The distinction between an annuity pure and simple, which is to be paid at all events out of the testator's estate at the expense of the residuary legatee, and the interest or income for life, of a certain sum set apart by the testator for that purpose, and given over in gross to another after the death of the life tenant, has been quite uniformly adhered to. *Baker v. Baker*, *supra*, was decided upon that distinction. Lord Cranworth, in delivering his opinion, said: "In all these cases arising upon the construction of wills, the real question is, whether that which is given is given as an annuity, or is given as the interest of a fund; and where that question is to be considered, what you must look to is this: whether the language of the testator imports that a sum, at all events, is annually to be paid out of his general estate, or only the interest, or a portion of the interest, of a capital sum which is to be set apart." This distinction is recognized by Lord Justice Rott in *Birch v. Shewall*, L. R. 2 Ch. App. 649. The principle on which it rests is that a bequest of a specific sum of money is one gift, one legacy, the benefit of which the testator has apportioned between the

donee for life and the remainderman. To the life tenant he has given the interest or produce of the fund during life, and the capital sum to the remainderman after the death of the former. Such a legacy is, therefore, subject to the rule that general legacies are to take effect and be payable at the expiration of a year from the testator's death. The executor is not bound to set apart the legacy for investment before the end of the year; and until that be done there is no fund to produce the interest that is payable to the life tenant. In *Knight v. Knight*, 2 Sim. & Stu. 490, the bequest was to each of the children of T. W., "as soon as they attain the age of twenty-one years, the sum of £2,000, with interest at the rate of five per cent. per annum;" and interest was held to be computable only from the end of the year, for the reason that the executors would not be bound to make an investment for the security of the legatees until the end of the year.

In the courts of this country the weight of authority is in the same direction.

Judge Redfield adopts the same distinction between annuities and accruing interest when made the subject of bequests, with respect to the time when the bequest becomes operative, as was taken by Lord Eldon in *Gibson v. Bott*. He holds that, in case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter; but that, when the interest or net income of a certain sum is given, the interest will not begin to run until one year from the decease of the testator, and the first payment will, consequently, become due in two years from that date. (3 Redfield on Wills, 184, c. V, § 25, p. 13.) In *Lawrence v. Embree*, 3 Bradf. Sur. R. 364, a bequest of interest or other income of a certain sum to be invested by executors was held not to begin to carry interest until the end of one year, at which time the investment should be made; and the distinction between an annuity and a bequest of the interest of a specific sum was made the basis of the decision. In the subsequent case of *Booth v. Ammerman*, 4 Bradf. Sur. R. 129, the subject received a careful consideration. The bequest under adjudication was to the testator's sister, "of the interest upon

fifteen hundred dollars, in case she should become a widow, during her widowhood, payable annually," and the executors were authorized to invest the estate in such sums and upon such terms as they might deem necessary for "the due execution of the will." The testator died in October, 1854, and the legatee became a widow in May, 1855. The question was, when the legacy became due, and from what time it bore interest. In delivering his opinion the learned surrogate adopted the distinction laid down by Lord Eldon in *Gibson v. Bott*, as a distinction in favor of annuities long recognized in the books. In commenting on the words "the interest," and "payable annually," in answer to the inquiry he propounds, whether it is an annuity or merely an ordinary legacy, he said: "It is not a stated sum, but may be more or less, according to the earnings of the capital; in this respect it does not possess the characteristic of an annuity, but is merely interest or income. It is payable annually; in this respect it possesses a characteristic common alike to an annuity and to interest, but not peculiar to either. In the present case the testator gives 'the interest upon fifteen hundred dollars;' the gift is of interest, and that is the entire substance of the gift. The mode of payment is 'annually,' and that relates to the payment and not to the gift. The thing given is the profits of a certain portion of the estate, to be separated in money and invested. It is given as interest of a demonstrated capital, and interest cannot, therefore, begin to accrue until the capital becomes due. The provision of the will would, therefore, seem to be satisfied by making the investment at the end of the year, and paying the interest annually to the life tenant. The will expressly provides for this investment, and, on the decease of the legatee, to whom the interest is bequeathed for life, gives the *corpus*, or capital, over. This bequest is substantially a legacy for life with remainder over; and the legacy would not become due so as to draw interest till the end of the year, unless otherwise specially directed. I do not think the direction to pay interest annually sufficient to take the case out of the general rule." These remarks have been quoted for the reason that they are applicable to the bequest under consideration, and, in my judg-

ment, are a correct exposition of the law on the subject. In that case the direction was that the bequest should take effect in case the legatee "should become a widow." She became a widow within the year. The surrogate regarded that language as prescribing a condition or contingency on the happening of which the legacy became due, and gave interest from the happening of her widowhood, and denied that the words "payable annually" amounted to such a special direction as would carry interest from the testator's death.

In *Cogswell v. Cogswell*, 2 Edw. Ch. 230, under a direction that executors should invest in stock a sum of money which would produce an annual income of \$1,000, and to permit testator's wife to take such income from time to time as the same should become payable, the executors were allowed one year to make the investment.

An examination of the cases which are usually cited as holding a different principle will disclose the fact that, with a few exceptions, they are cases coming within some one of the exceptions above stated to the general rule.

In *Williamson v. Williamson*, 6 Paige, 298, the bequest was of the interest or income of the residuary estate to the legatee for life. In *Craig v. Craig*, 3 Barb. Ch. 76, one of the bequests was in the form of a direction for the investment of such a sum as would produce in legal interest \$500 per annum, as a provision for the testator's lunatic son, which should give him "a sure and ample support during his life;" the other was of an annuity of \$1,000 per year to the testator's wife, the principal to be invested as she might reasonably require. In *Cook v. Meeker*, 36 N. Y. 15, the legatees for life were the wife, daughter and grandchildren of the testator, and their legacies were considered as intended to provide a fund for their support and maintenance. In *re Devlin's Estate*, 1 Tucker, 460, the legatees were children without any other means of support, and the case was expressly decided upon the distinction between interest upon a sum of money left as a legacy, and an annuity or income bequeathed for the support of the legatee. In *Swett v. Borton*, 18 Pick. 123, the gift to the legatee was of the interest of \$50,000 from the time of the

testator's decease during the life of the legatee. In *Brimblecom v. Haven*, 12 Cush. 511, the bequest was "of the interest of \$6,000," without any gift over of the principal sum; and the court held that, there being no setting apart of any fund to answer the legacy, it was, in effect, the gift of an annuity of a fixed sum of money annually, fixed and expressed by the term "interest of \$6,000." The two cases cited from the courts of Pennsylvania (*Eyre v. Golden*, 5 Binn. 472, and *In re Hilliard's Estate*, 5 Watts & Serg. 30), may be considered as direct authorities in favor of the view adopted by the court below. But these cases, if they do not stand alone, are contrary to the great weight of authority, and are against correct principles.

The decisions in the courts of this State on this subject have adopted and followed the law as laid down by Lord Eldon and by Mr. Roper.

In *Halsted v. Meeker, Ex'r*, 3 C. E. Green, 136, upon a direction in the testator's will that executors should place the sum of \$20,000 at interest, and pay the net income or interest thereof, semi-annually to the testator's daughter, Chancellor Zabriskie held that the executors were required to invest at the end of the year, and that the legatee was entitled to the interest which should accrue from that time. In *Henion's Ex'r's v. Jacobus*, 12 C. E. Green, 28, the bequest was to the testator's daughter, of the legal interest of \$1,400, to be paid to her annually, and the principal at her death to be divided among her heirs. Chancellor Runyon held that the interest payable to the testator's daughter was to be computed from the end of one year from the testator's death. The same rule was re-affirmed and applied in *Howard v. Francis*, 3 Stew. 444. These cases from the Court of Chancery were cited with apparent approval in *Van Blarcom v. Dager*, 4 Stew. 495. They are decisions of a court of co-ordinate jurisdiction, and ought not to be disregarded or overruled except for the most cogent reasons. They apply directly to this case, and in my judgment were correctly decided.

I think that for the reason already given, the judgment should be reversed.

It may be remarked that, on a ground that may be technical, and was not taken on the argument, the same result would be reached. The testatrix directs that none of the legacies or interest given or bequeathed, shall be due or payable during the lifetime of her mother. A copy of the will is annexed to the declaration, and by averment, made part of it; and the death of the mother of the testatrix is nowhere averred in the pleading.

Judgment reversed.

From what date legacies draw interest.—It is usually laid down that general legacies are to be raised and satisfied out of the testator's estate at the expiration of one year next after his death, and that interest is allowed from that time. *King's Estate*, 11 Phila. 26; *State v. Crossley*, 69 Indiana, 208; s. c. 1 Am. Prob. R. 418; *German v. German*, 7 Cold. (Tenn.) 190; *Derby v. Derby*, 4 R. I. 414; *Howard v. Francis*, 30 N. J. Eq. 444; s. c. 1 Am. Prob. R. 321.

The same rule as to interest has been maintained in Pennsylvania, even though the fund was not collected for several years. *Martin v. Martin*, 6 Watts, 67.

In case of a contest over the will begun before the expiration of the year, interest will not commence to run until the contest is determined. *Johnson v. Turley*, 4 Bush, 399; *State v. Adams*, 71 Mo. 620; *Vandergrift's Appeal*, 80 Penn. St. 116.

Where the estate of a testatrix was a residuary interest in property in which her mother had a life interest, it was held that the legacies in her will drew interest—her mother surviving her eleven years—not from one year after death, but immediately from the death of the mother. *Wheeler v. Ruthven*, 74 N. Y. 428.

Exceptions to the general rule.—I. A legacy given in satisfaction of a debt draws interest from the testator's death. *Hepburn v. Hepburn*, 2 Bradf. 74; *Parkinson v. Parkinson*, Id. 77; *Seymour v. Butler*, 3 Id. 193.

But when given to an executor in payment for his services, it draws no interest. *Morris v. Kent*, 2 Edw. Ch. 175.

II. A legacy given to a minor child, or one to whom the testator stands *in loco parentis*, draws interest from the testator's death. *Green v. Blackwell*, 33 N. J. Eq. 768; *King v. Talbot*, 40 N. Y. 76; *Brown v. Knapp*, 79 N. Y. 136; *Cooper v. Scott*, 62 Penn. St. 139; *Allen v. Crossland*, 2 Rich. Eq. 66; *Miles v. Boyden*, 3 Pick. 213; *Loring v. Woodward*, 41 N. H. 391.

Unless a contrary intent plainly appears. *Huston's Appeal*, 9 Watts, 472; *Leeches' Appeal*, 44 Penn. St. 140.

This rule applies where the legacy is plainly given for the support and

maintenance of the legatee. *Hart v. Williams*, 77 N. C. 426; *Lasley v. Lasley*, 1 Duv. (Ky.) 118; *Devlin's Estate*, 1 Tucker, 460; *Morgan v. Pope*, 7 Cold. (Tenn.) 541.

III A legacy given as an annuity draws interest from the death of the testator. *Fish's Estate*, 1 Tucker, 122; *Devlin's Estate*, Id. 460; *contra*, *Jones v. Stockett*, 2 Blod. (Md.) 409.

But where the annuity is made a charge, not upon the capital, but upon the income of the estate, it draws interest only after one year from the testator's death. *Morgan v. Pope*, cited above.

IV. A legacy of the residue of an estate, or of some aliquot part or portion thereof, in trust, to pay interest or income to legatee for life, with the gift of the principal over at his death, draws interest from the death of the testator. *Harrison v. Henderson*, 7 Heisk. 815; *Hilyard's Estate*, 5 W. & S. 10; *Spangler's Estate*, 9 Id. 185; *Ayer v. Ayer*, 128 Mass. 575; s. c. 1 Am. Prob. R. 604.

And one entitled to the money, under the will, after the death of the life tenant, may recover interest from the death of such tenant, in the form of a general money demand against his estate. *Hitchcock v. Clendennin*, 6 Mo. App. 99; *contra*, *Shobe v. Carr*, 8 Munf. (Va.) 10.

Specific legacies draw interest from the testator's death. *Smith v. McKitterick*, 51 Iowa, 548; s. c. 1 Am. Prob. R. 49; *Beal v. Crafton*, 5 Ga. 301.

Where a legacy is made payable on a contingency—as upon the settlement of an estate—the legatee is not entitled to interest until the happening of the contingency, and his legacy is lawfully demandable. *Valentine v. Ruste*, 98 Illinois, 585; *Booth v. Ammerman*, 4 Brad. 129; *Dewart's Appeal*, 70 Penn. St. 403; *Holt v. Hogan*, 5 Jones' (N. C.) Eq. 82; *Drayton v. Grimke*, 1 Hill's S. C. Ch. 324; *Jones v. Ward*, 10 Yerg. (Tenn.) 160.

If a time is fixed in the will for the payment of a legacy, it draws interest from that time. *Page's Appeal*, 71 Penn. St. 402; *Mourain v. Poydras*, 6 La. Ann. 151; *Smith v. Moore*, 25 Vermont, 127; *Rogers v. Rogers*, 2 Redf. 24; *Lynch v. Mahoney*, Id. 434.

Demand of payment is not necessary to entitle legatee to interest. *Kent v. Dunham*, 106 Mass. 586; *Keech v. Speakman*, 1 Clark (Penn.), 72.

Where land is directed to be sold, and legacies to be paid out of the proceeds, interest runs from the day of the sale. *Trippe v. Frazier*, 4 Har. & J. 46; *Fincke v. Fincke*, 53 N. Y. 528.

Where land was devised to A., subject to a legacy to his sister, and the sister lived with her brother for a long time, without paying board, and without making any demand for the legacy, the land finally being sold, it was held that the legacy did not draw interest during the time prior to the sale. *Ogle v. Taylor*, 49 Maryland, 158.

In case of a demonstrative legacy, interest begins to run one year after the testator's death, and not at the time when the land, out of the proceeds of which the legacy was to be paid, was actually sold, which was eleven years after the testator's death. *Bradford v. McConihay*, 15 W. Va. 732.

Bequest of life estate in residuary fund. *Weld v. Putnam*, 1 Am. Prob. R. 202; see generally, *Howard v. Francis*, Id. 321.

PORTER'S APPEAL.

[94 Penn. St. 332.]

CONSTRUCTION OF TECHNICAL WORDS.

Where a will is artistically drawn and evinces an accurate use of technical terms, the presumption is that the testator used them in their legal sense.

Testator after identifying notes of his son and daughter added, they "are deemed by me as advancements to the respective drawers thereof; and I order and direct that they be valued and appraised at their full amounts as assets of my estate in the hands of my executors, and to be respectively paid and accounted for by the respective drawers thereof at the first distribution of the residue of my estate, out of their respective shares therein." *Held*, the will being artistically drawn the word advancement was used in a technical sense, and it was error to charge interest on the notes in distributing the estate.

APPEAL of Mary C. Porter, from the decree of the court dismissing the exceptions to, and confirming the report of the court auditor, in the distribution of the estate of Henry Eberle, deceased. Henry Eberle died in February, 1876, leaving five children, and a will dated October 15th, 1875, which contained the following clause: "The note of \$4,000 dated August 6th, 1868, bearing interest at the rate of five per cent. per annum, which I hold against my daughter Mary; and the one of \$3,000, bearing date the same day, at same rate of interest, which I hold against my son Benjamin F. Eberle, are deemed by me as advancements to the respective drawers thereof, and I order and direct that they be valued and appraised at their full amounts as assets of my estate in the hands of my executors, and to be respectively paid and accounted for, by the respective drawers thereof, at the first distribution of the residue of my estate out of their respective shares therein."

The note of his daughter Mary, who was intermarried with George W. Porter, was as follows:

"One year after date I promise to pay to Henry Eberle, Sr., or order, Four Thousand Dollars, without defalcation, for value received, with interest at five per cent. per annum until paid. Witness my hand and seal this sixth day of August, One Thousand Eight Hundred and Sixty-one.

"Witness:

"A. M. HERSHEY.

MARY C. PORTER. [SEAL.]"

By the terms of his will, the executors of the testator, John H. Zeller, and testator's son Benjamin F. Eberle, were directed to sell his real and personal property, and the proceeds of his residuary estate were to be divided in equal shares among his five children. When they filed their inventory the executors included therein the two notes of Mary C. Porter and Benjamin F. Eberle, with interest charged thereon to date of filing said inventory. Benjamin F. Eberle accounted for the amount of his note \$3,000, with the interest \$2,347 91, and the executors charged themselves with \$5,347 91. Mrs. Porter claimed that while the principal of her note was to be deducted from her share, under her father's will, she was not to be charged with interest thereon; that by the terms of said will, said principal was converted into an advancement, and that it did not carry interest.

The executors' account was referred to an auditor, A. Slaymaker, Esq., before whom it appeared that when Mary C. Porter gave her note to her father, she was a married woman; that she gave said note to her father at his request to secure certain indorsements made by him to her husband, George W. Porter, who died in 1863. The testator subsequently learned that the note was void because of Mrs. Porter's coverture. Parol evidence was offered of declarations made by the testator in his lifetime, to the effect that Porter had gotten the money, and that it went through his hands, and that Mary had no benefit therefrom, and that he thought therefore it was not right to charge her with interest on the money; that he had a notion to try to fix it, and give her a receipt for the interest; that he had come to the conclusion, that to give satisfaction, he must charge Mary with the \$4,000, but no interest thereon. This evidence was taken, but was afterwards excluded by the auditor as inadmissible.

S. H. Reynolds & H. C. Brubaker, for appellant. •

N. Eulmaker, D. G. Eshleman & H. M. North, for appellees.

TRUNKY, J. The intention of the testator is the prevailing consideration in applying all rules of construction. It is

the intention of the testator expressed in the will that is to govern; and this is to be judged of exclusively by the words of the instrument, as applied to the subject-matter and surrounding circumstances. Parol evidence to show what were the actual testamentary intentions, such as his declarations of what he had done or meant to do, is inadmissible; but it is competent to determine which of several persons or things was intended under an equivocal description. In construing the autograph will of an illiterate man, the meaning of technical language may be disregarded, but no word which has a clear and definite object may be struck out. Technical words and phrases, although *prima facie* to be taken in their true sense, will not be construed so as to defeat any obvious general intention of the testator, since wills are often prepared by persons wholly unacquainted with the precise technical force of legal words and formulas. In seeking for the expressed intention of the testator, his words are to receive that construction and interpretation, which a long series of decisions has attached to them, unless it is very certain they were used in a different sense. These oft-repeated rules are recalled by the question now presented.

This will is artistic and evinces an accurate use of technical terms. Hence, the presumption that the testator employed them in their legal sense, will not be so easily overcome as if the will bore on its face evidence that it was drawn by an ignorant man. Here is no exhibition of such illiteracy as calls for a departure from the actual meaning of its words to a real or supposed popular sense, but rather such skill as induces belief that its words, which have been judicially defined, were understandingly employed.

An advancement is an irrevocable gift by a parent in his lifetime, to a child, on account of such child's share in the parent's estate. It is valued as of the time of the gift. Therefore, interest is not chargeable thereon, unless there be clear expression that it shall carry interest, as was the case in *Fickes v. Wireman*, 2 Watts, 314. Statutory provisions respecting advancements are applicable only to the children of intestates.

When the parent, giving money to a child, takes a note for

repayment, it is a debt. If such note be void because the maker was a married woman, the money is not an advancement. But a parent has power by his will to turn a debt into an advancement, and when he does so, he gives it all the usual incidents, one of which is that it shall be valued as of the date the child received the money. It will not continue a debt as regards interest, and a gift as regards principal, unless he plainly says so. *Green v. Howell*, 6 W. & S. 203; *Hutchinson's Appeal*, 11 Wright, 84.

In this case the testator declared that he deemed the note he held against his daughter, Mary, as an advancement, and directed that it be valued and appraised at its full amount, as assets of his estate in the hands of his executors, and to be paid and accounted for by her at the first distribution of the residue of his estate, out of her share therein. In unmistakable phrase, he turned the debt into a gift to be valued at the date of the note. The word advancement occurs nowhere else in the will, nor is there anything to show it was not used in its legal sense. The advancement is directed to be valued and appraised at its full amount, as assets for distribution, and to be deducted from her share. Of what date shall it be valued? Giving every word its proper meaning, at the date of the gift. Its full amount is the face of the note without interest. To "be valued and appraised" has no significance as showing inclusion or exclusion of interest; for even if the note were a debt, mere appraisal means its amount either with or without interest, according to the contract. A debt on interest by contract. A debt on interest by contract or overdue, converted into an advancement and directed to be appraised as part of the assets, is taken without interest unless otherwise expressed. No case has been found to the contrary.

We are of opinion that the testator's intention expressed in his will is not doubtful; but if it be, no rule of interpretation requires or permits the well-settled meaning of an apt word to be set aside by a direction, which admits of a construction consistent with that meaning. It was error to charge Mrs. Porter any interest on the principal sum of \$4,000, which was made an advancement to her.

Decree reversed, and it is ordered that the record be remitted to the Orphans Court for further proceeding. Costs of this appeal to be paid by the executors out of the moneys of the estate.

See Wright's Appeal, 1 Am. Prob. R. 125.

FREY vs. THOMPSON'S ADMINISTRATOR.

[66 Alabama, 287.]

BEQUEST TO WIDOW DURING WIDOWHOOD TO BE CUT DOWN ON MARRIAGE.

Testator bequeathed real and personal estate to his widow, "to have and to hold the same during her widowhood," and should she marry after his decease, then she was to have only a child's part of the property. *Held*, that the widow's estate was terminable by her marriage only, and was not affected by her death unmarried.

ACTION in the nature of ejectment by John S. Hale, administrator *de bonis non* with the will annexed, of Edward Thompson, deceased, against Andrew C. Frey and W. H. Jervis.

The will of Edward Thompson, under which both parties claimed, is as follows:

"State of Alabama } I Edward Thompson of the State
Morgan county. } and county aforesaid being of sound mind and in perfect health do make this my last will and testament in manner and form following that is to say I give and bequeath unto my beloved wife Margaret Thompson all my landed estate consisting of the quarter section I now reside upon together with the quarter section I have lately bought of Richard Carter known by certificate to be the N west quarter

of section three of Range five of Township six the E half of N East quarter of section thirty three Township five of Range five west and forty acres of land known by certificate to be the South half of the East half of the N west quarter of section thirty four Township five Range five west together with money sufficient to patent such of the above described lands as remain unpatented and I also give and bequeath unto my wife as afore-said all my stock of cattle hogs sheep and three horses of her choice all my farming tools blacksmith tools house hold and kitchen furniture and the following negroes," giving their names; "and one wagon and two yoke of oxen to have and to hold the same during her widowhood the balance of my property I wish my executor or executors to sell and the proceeds thereof to be equally divided among my children except my daughter Jane Pulliam her part I wish to be given to the heirs of her body as they become of age or are legally represented. All my money on hand and all that is due me or may become due me except what is sufficient to patent the lands as above described is to be divided as the residue of my property after my wife's part being taken out except my wife is to have a child's part of said money and dues. Now should my wife Margaret Thompson marry after my decease she is to have only child's part of all the above described property that I have bequeathed to her. Now to conclude I nominate and appoint my wife Margaret Thompson and my son James Thompson my executors in testimony whereof I affix my hand and seal this 9th December, 1830."

The will of Edward Thompson was duly probated in 1835. His widow, Margaret, died in 1878, not having married after testator's death. She had possession of the lands affected by his suit until 1878, when, on a sheriff's sale under a judgment against her, they were sold to the defendants.

The judge charged the jury that if they believed the evidence they would find for the plaintiff, to which defendants excepted.

T. H. Watts and *C. C. Harris*, for appellants.

H. A. Sharpe, opposed.

BRICKELL, C. J. The testator, by his will, devises the real estate in controversy, directly and immediately, to his widow, in terms which carry the fee simple. The estate is, however, subject to be divested upon a single event, or contingency, - the marriage of the widow. There is no other event or contingency provided, in which the estate is to cease and determine, and no gift over on its determination, except to the widow. The rule is, that where there are clear words of gift, the courts will not permit an absolute gift to be defeated, unless it is clear that the very event or contingency has happened in which it is declared that the interest shall cease. It is not to be inferred, or implied, that the absolute gift is infringed further than is expressed. (*Sherrod v. Sherrod*, 38 Ala. 53; *Harrison v. Foreman*, 5 Vesey, 207.)

A like rule prevails, when prior or particular and ulterior estates are created. If the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the prior gift has in event taken place, but is afterwards determined in a different mode from that which is expressed by the testator, the ulterior gift fails. (1 Jarman on Wills, Bigelow ed. 803.) It is upon the exception to this rule the appellant relies, which is thus stated: "When a testator makes a devise to his widow for life, if she shall so long continue a widow, and if she shall marry, then over; in which the established construction is, that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect on all events on the determination of her estate, whether by marriage or death." (1 Jarm. Wills, 803.) Or, as it is stated in the recent case of *Underhill v. Roden*, 2 Law Rep. Ch. Div. 496: "Where a testator gives to a woman a life interest, if she so long remains unmarried, and then directs that, in the event of her marriage, the property shall go over to another; although according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over is held to take effect, even though the tenant for life does not marry." But the exception does not apply when there is an absolute estate given to the widow, and thereon is engrafted a devise over, to take effect on her marriage: then the general rule applies, that a clear vested interest

can be divested only upon the happening of the precise contingency expressed. (1 Jarman on Wills, Bigelow's ed. 804.)

There is often much of difficulty in determining whether the event of not marrying is interwoven into the original gift, thus creating an estate *durante viduitate* only, or whether it is a condition or contingency on which the estate is to be divested and determined. (*Bainbridge v. Cream*, 16 Beav. 25; *Meads v. Wood*, 19 Beav. 215.) When all the words of the present will are read together, the intention of the testator is plain, and it is that intention which must prevail—a gift of an absolute estate to the wife, to be divested and determined on this express condition only, that she should marry again; and not a gift to her for life, or during widowhood. (*Sheffield v. Lord Orrery*, 3^d Atk. 283.) Upon any other construction, though it is apparent the testator intended to dispose of his whole estate, and not to die intestate as to any part thereof, real or personal, a partial intestacy would be produced. For, in the event of the marriage of the widow there is no gift or devise over, except of a child's part to her, the quantity of which can be ascertained only from the statutes of descents and distributions. Courts are disinclined to construe wills so as to produce partial intestacy. (1 Jarman on Wills, Bigelow's ed. 851.) The purposes of the testator seem clear; his widow was the primary object of his bounty, the mother of his children. If she did not marry again, the children would take from her, as they would take from him if she should marry. Having, doubtless, confidence that she would be just and generous to her and his children, he gives and devises to her the absolute estate, subject to be divested if she should marry again, introducing a stranger to share it with her, and probably having issue to take from her who would be alien to his blood. Besides, the gift over to the widow of a child's part of the estate, real and personal, if she married, indicates clearly an intention to make a provision for her in that event, which defeated and divested the absolute estate already given to her.

The Circuit Court erred in the charge given; and the judgment must be reversed, and the cause remanded.

See *Stillwell v. Knapper*, 1 Am. Prob. R. 211.

HAINES vs. ALLEN.

[78 Ind. 100.]

CHARITABLE TRUST FOR SUPPRESSING SALE OF INTOXICATING LIQUORS.

A bequest in a will, devising to the trustees of a certain organized church, having trustees, and to their successors, \$1,000, to be put at interest, and the interest to be appropriated annually to the suppression of the manufacture, sale and use of intoxicating liquors, and providing that if said trustees failed for two successive years to use the interest as directed, then the whole bequest should go to the heirs of the testator, is valid.

FROM the Spencer Circuit Court.

D. T. Laird and *W. H. Thomas*, for appellants.

I. S. Moore and *T. F. DeBruler*, for appellees.

BIORNELL, C. C. The last will of James D. Allen contained the following provisions:

"Item 2. I will and bequeath to the Trustees of the Methodist Episcopal Church, now organized in Rockport, Indiana, and to their successors in office, \$1,000, to be put at interest, and the interest to be applied, annually, to the payment of the salary of the preacher in charge at the time.

"Item 3. I will and bequeath to the aforesaid trustees \$1,000, to be put at interest, and the interest to be appropriated, annually, to the suppression of manufacturing, selling or using of intoxicating liquors. Now, should the said trustees refuse or neglect for two successive years to use the above named interest as directed, in either or both cases, any one of my legal heirs shall have the right to draw out both principal and interest, and divide it equally between my heirs.

"Item 8. I will that the trustees, heretofore designated, shall superintend the carrying out of this will, and the winding up of my estate, by electing one of their body as executor, but if none of their body be willing to serve, then for them to agree on some good man, outside of their body; then after

the said trustees have selected an executor, it is my will that they, as a body, shall continue to see that the will be fully and faithfully carried out."

The will was dated March 16th, 1878; the testator died August 1st, 1878. At those dates the trustees of the Methodist Episcopal Church, in Rockport, were Lewis G. Smith, John Bayse, James P. Bennett, James H. William and William H. Thomas. Of these John Bayse undertook to act as executor of the will, but he soon resigned, and Willis Haines was appointed administrator with the will annexed *de bonis non*. The testator died a widower without issue; his only heirs at law were his brothers and sisters, and his nephews and nieces.

These heirs at law, in October, 1879, brought this suit against the administrator *de bonis non* and the trustees, stating in their complaint the foregoing facts and claiming that the bequest to the trustees was void for uncertainty, and that the money belonged to the heirs; and they prayed that the probate of the will, as to said item 3, should be set aside and declared void, and that said administrator should be required, in settling said estate, to pay said \$1,000 to the plaintiffs.

A demurrer to the complaint, for insufficiency of facts, was overruled, and, the defendants refusing to answer, final judgment was rendered against them upon the demurrer, that the third item of the will is void; that as to said \$1,000 the testator died intestate, and that the plaintiffs are entitled to it, and that said administrator shall pay it to them in course of distribution.

From this judgment the defendants appealed. The only error assigned is overruling the demurrer to the complaint.

There is no brief on behalf of the appellees.

The complaint alleges that the will cannot be carried into execution, because it does not define what are intoxicating liquors, nor authorize the trustees to do so; and does not point out how the money shall be used to secure the object of the bequest, and because, if the trustees should fail or refuse to execute the trust, there is no beneficiary named in the will, with power to require the enforcement of the trust.

These objections cannot be sustained. The phrase "intoxicating liquors" means liquors that will intoxicate; no definition of it is necessary.

The will need not point out any plan by which the object of the bequest shall be accomplished. It is sufficient if the will appoints trustees, with power to appropriate the money in aid of the object named, in such manner as they shall think fit. *Whitman v. Lex*, 17 S. & R. 88; *Beekman v. Bonsor*, 1 N. Y. 298.

The will provides what shall be done, if the trustees fail to execute the trust, and where the bequest is for a general charity, such as a provision for a class of indigent persons, or for the suppression or alleviation of any of the forms of wretchedness and vice, and proper trustees are appointed to execute the bequest, it is not necessary that any individual beneficiary be named.

Preventing the use of intoxicating liquors, regarded as a means of promoting individual and social welfare, may be deemed a proper subject of charitable bequest, and whether the object shall be sought by the distribution of documents or lectures, or by other reasonable and appropriate means, is a matter within the discretion of the trustees. .

Where certain and ascertainable trustees are appointed with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity.

Where trustees capable of taking the legal estate were originally appointed, so that a valid use was in the first instance raised, and the case was thus brought within the jurisdiction of the Court of Chancery, that court will supply any defect which may arise in consequence of the death, or disability or refusal of the trustees to act. *Grimes' Exrs v. Harmon*, 35 Ind. 198. The following cases support the foregoing conclusion and show that the will under consideration was valid. *Bruler v. Ferguson*, 54 Ind. 549; *McCord v. Ochiltree*, 1 Blackf. 15; *Vidal v. Girard's Exrs*, 2 How. 127; *Cruse*

Atell, 50 Ind. 49; *Craig v. Secrist*, 54 Ind. 419; *The Board, cc. v. Rogers*, 55 Ind. 297; *Ex parte Lindley*, 32 Ind. 367.

The court below erred in overruling the demurrer to the complaint. The judgment of the court below ought to be reversed, and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to the court below to sustain the demurrer to the complaint.

See *Rhymer's Appeal*, *infra*; *Manners v. Philadelphia Library Co.*, *infra*; *Nichols v. Allen*, *infra*.

MOORE vs. SANDERS.

[15 South Carolina, 440.]

LIMITATION OVER DEPENDENT ON REPUGNANT CONDITION SUBSEQUENT.

will provided as follows: "I give, devise and bequeath my whole estate both real and personal, all that I now possess or may hereafter become possessed of, to my beloved son Matthew. Learning that the law takes cognizance of the intention, even when illegally expressed, I desire to express my wish as strongly and emphatically as I can do so by will, that my beloved son Matthew shall inherit, possess and own, in fee simple, all my worldly goods—to dispose of as he may think fit. But should he die without leaving a will, then the whole to go" over. *Held*, that the limitation over depended upon a condition subsequent, which was void because repugnant to the estate devised, and that Matthew held, in fee simple absolute, a tract of land derived under this will.

THIS was a controversy without action, instituted in February, 1881. The will here construed bears date January 4th, 1868. The opinion states the case.

J. H. Earle, for appellant.

Blanding & Blanding, for appellee.

SIMPSON, C. J. This is a case submitted without action under section 389 of the code. It appears that Matthew S. Moore, the respondent, bargained to sell and convey, in fee simple, a certain tract of land to George M. Sanders, the appellant, for \$3,500. Moore offered and is still ready to execute titles, but Sanders declines to accept his deed, alleging that Moore cannot convey in fee. Moore's title is derived from the will of his mother, Mrs. Sarah J. C. Elliott, deceased. So much of this will as it is necessary to consider, is in the following language: "I give and bequeath my whole estate, both real and personal, all that I now possess or may hereafter become possessed of, to my beloved son, Matthew S. Moore. Learning that the law takes cognizance of the intention, even when illegally expressed, I desire to express my wish as strongly and emphatically as I can do so by will, that my beloved son Matthew S. Moore, shall inherit, possess and own, in fee simple, all my worldly goods, to dispose of as he may think fit. But should he die without leaving a will, then the whole to go to my grandchildren, share and share alike. The children of any grandchildren who may die before such division taking the share which the parent would have been entitled to had said parent lived to the period of said distribution or division."

Upon the hearing below Judge Thomson decreed that the estate devised to Moore is a fee and that he is able to make good and sufficient titles to Sanders. Sanders excepted to this decree. His appeal brings up the single question: Did Moore take under the will of Mrs. Elliott a fee indefeasible in the land in question?

It will be seen on reading the will that Mrs. Elliott in the beginning of the clause above, bequeathed and devised to her son, the respondent, her entire personal property, and also a fee in all of her real estate; and if there was no other provision in her will, no difficulty whatever could have arisen as to

s construction. She, however, with the view, as she thought, more distinctly to declare her intention, went further, and, as not uncommon in such cases, instead of more clearly expressing her purpose, said just enough to create doubt and to demand the assistance of the courts to ascertain and declare what she really did mean. After giving her whole estate to her son, in the first part of the clause above quoted, in the latter she directed that if her son should die without leaving a will, then the whole should go to her grandchildren, share and share alike. It is here that the ambiguity arises. It is contended that this portion of the clause attached a condition to the estate previously given, which, if not complied with by Moore, will forfeit the estate, and, therefore, that he is not able to convey a perfect title, absolute and indefeasible.

Conditions are of two kinds—conditions precedent and conditions subsequent. A condition precedent is a condition upon the happening of which an estate will vest. A condition subsequent defeats an estate already vested. It is contended that this is a condition subsequent.

It is a general rule as to conditions subsequent, that to be valid they must not be repugnant to the estate given or devised. They must not be an exception to the very thing, that is, to the substance of the gift; if so, they are void, and the estate granted will stand unaffected by such conditions. Thus, in *Blackstone Bank v. Davis*, 21 Pick. 42, it was held that "a condition in a grant or devise that the grantee shall not alienate, is void, because repugnant to the estate." Also in *Bradley v. Peixoto*, 3 Ves. 324, it was held that an exception to the very thing itself by way of condition is null. 2 Bl. C.; 2 Washb. on Real Prop. 6, lay down the doctrine clearly that a condition subsequent, inconsistent with and repugnant to the amplitude of the powers of the estate granted is void, and, therefore, no condition.

Now, test this clause of Mrs. Elliott's will by this principle. It is conceded that an estate in fee was devised in the first instance by Mrs. Elliott to her son. The power of alienation belongs to a fee; in fact it is the very essence of a fee. Is the condition which the latter portion of the clause attempts to

attach to the devise inconsistent with and repugnant to this devise? The performance of the condition would require Moore to die in possession of the real estate devised to him. In no other way could he leave a will disposing of it.

The condition, then, is a direct and positive restriction upon his powers of alienation. The will invests him with a fee, but the condition strikes at the very substance of this fee, and if valid, would take away and destroy its most important and essential quality—the power of sale. A fee may be defeated by a condition which is independent of the estate granted upon the happening of which the estate is lost; but a condition, the effect of which is to cut down a fee to a less estate, is void because repugnant to the fee. Such is the character of the condition in this case, and according to the authorities cited it is void.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

MOLVER and MCGOWAN, A. JJ., concurred.

SIMPSON *vs.* WELCOME.

[72 Maine, 496.]

CHARITABLE BEQUEST TO PURCHASE AND DISTRIBUTE RELIGIOUS BOOKS.

A bequest of "all that may remain" of testator's real and personal estate, in trust to persons named, "to expend" the same "in the purchase and distribution of such religious books or reading as they shall deem best and as fast as the funds shall come into their hands," is sufficiently definite and certain to create a valid charitable use.

The word "religious," applied to books and reading, means tending to promote the religion taught by the Christian dispensation.

APPEAL from a decree of judge of probate made to obtain

instruction of the fourth item of the will of Ralph Harley, deceased, which is stated sufficiently in the opinion.

A. P. Gould, for appellants.

Byron D. Verrill, for executors.

DANFORTH, J. The question involved in this case is the construction of the fourth item in the will of the late Ralph Harley, or the validity of the gift contained therein. The item so far as material is as follows: "I hereby give, devise and bequeath in trust to L. C. Welcome, of Yarmouth, and Franklin L. Carney, of Newcastle, all that may remain both of my real and personal estate, * * * and further direct the said Welcome and Carney to expend all that may remain * * * in the purchase and distribution of such religious books or reading as they shall deem best and as fast as the funds shall come into their hands."

The objection made is that the direction as to the appropriation of the fund is too vague and indefinite to be sustained.

The meaning of the testator is not obscure or open to doubt. That the fund is given in trust, that the whole of it is to be expended in religious books or reading, that all the books or reading so purchased are to be distributed, and that the class of persons to whom distribution is to be made is limited only by the discretion of the trustees, are all so clearly within the meaning of the testator as expressed in his will, as not to admit of doubt. But it is claimed that vagueness and uncertainty attaches both to the character of the books to be distributed and the persons or class who are the beneficiaries under the gift.

The word "religious" is the only expression descriptive of the character of the books to be bought and distributed, and describes such as teach or inculcate religion. It is true that religion in its broadest sense, may include all the different systems of faith and worship which can be found in the world. In this sense it may be conceded that the trust is one which

neither law nor equity would sustain. In the great variety of religions prevailing, and so great the conflict between them, if all were to be included, the intention of the testator could not be executed; if one, or more, his intention could not be ascertained. But happily we are not reduced to this dilemma. Words used in a will, as in other instruments, are construed in connection with the words in whose company they are found, as well as in the light of the circumstances in, and under which they are used.

In this case the testator had his domicile and made his will in a country where, though there is no religion established by law, there is one general system which is universally recognized as embodying the true faith, and whatever difference there may be in the detail, as to belief or form of worship, all the different denominations are equally entitled to the protection of, and are equally recognized by, the law. Under these circumstances when religious books or reading are spoken of, those which tend to promote the religion taught by the Christian dispensation must be considered as referred to, unless the meaning is so limited by associate words or circumstances as to show that the speaker or writer had reference to some other mode of worship. There is no such limitation in this case. Whether this testator or his trustees were or are believers in any form of religion which may, *ex cathedra*, be pronounced superstitious, or erroneous, does not appear. Nor can we assume such to be the fact from the absence of any evidence upon that point. The inference is the other way, and we must conclude that the meaning to be attached to the word "religious" as used in the will, is the same as that which is usually given to it in the community under like circumstances. If susceptible of two or more meanings, the better, that which is more consonant with the policy of the law and productive of the welfare of society, is to be taken rather than the other.

It is true that no beneficiaries are specifically named. If this is a public charity it is not necessary that any should be named. The persons to be reached are left to the discretion of the trustees, and are otherwise unlimited in numbers or class. The object to be accomplished may be considered the general wel-

are of the community, or, if circumstances permit, even that of mankind. In either view it may be sustained, as in the case of the gift for the Smithsonian Institution, at Washington, "for the increase of knowledge among men," approved by the courts of England, and in *Whicker v. Hume*, 14 Beavan, 509; s. c. 7 L. L. C. 124, in which the trustees were to apply the fund given in "their absolute and uncontrolled discretion, for the benefit and advancement, and propagation of education and learning in every part of the world, so far as circumstances will permit." This case is, in the principles involved, similar to and decisive of the one at bar. It is not material that the names or number of persons to be benefited should be given if the purpose to be accomplished is made certain. The very idea of a public charity is that the benefit is to be generally bestowed. *Going v. Emery*, 16 Pick. 107.

That this legacy must be considered legally as intended for public charity would seem to be well settled by the authorities in England and in this country. True it is not so named in the will, nor does it come within the terms of the stat., 43 Eliz. c. 4, which is descriptive of public charities, and has been adopted as part of the common law here. *Going v. Emery*, *supra*. It is sufficient if the terms used bring it within the description of a charity, and within the spirit of the statute referred to. 2 Story's Eq. Jur. §§ 1155-1164. Lord Camden, in *Tones v. Williams*, Amb. 651, defines a charity as "a gift to a general public use, which extends to the poor as well as the rich." After a full review of the authorities, Gray, J., in *Jackson v. Phillips*, 14 Allen, 556, defines a charity, in the legal sense, "as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion," &c. These definitions, so far as we have been able to ascertain, are fully sustained by the cases, and fully cover the legacy in this case. See, also, 2 Redfield on Wills, § 71, and cases cited; *Drew v. Wakefield*, 54 Maine, 291; *Everett v. Farr*, 59 Maine, 325; *Bartlet v. King*, 12 Mass. 537.

In view of these authorities we may well adopt the language of Shaw, C. J., in *Going v. Emery*, 16 Pick., on page 119, as

particularly applicable to this case. "The donees are particularly designated, the trust is clear, the general objects sufficiently indicated to bind the consciences of the trustees, and to render them liable in equity to account for the execution of the trust, by a suit to be instituted in the name of the attorney general, representing the public; and that these objects are sufficiently certain and definite, to be carried into effect, according to the established principles of law and equity, governing donations to charitable uses."

Decree of Probate Court affirmed.

See *Haines v. Allen*, *ante*, page 242, and references in note.

McKIM *vs.* AULBACH.

[180 Massachusetts, 481.]

LIABILITY OF CO-EXECUTORS.—EFFECT OF JOINT RECEIPT.

An executor who gives a separate bond is not liable for a loss caused, without negligence on his part, by the default of his co-executor.

A joint receipt, or a joint release of a mortgage, signed by two executors, is only *prima facie* evidence that the money derived therefrom came into the possession or under the control of both, and this presumption may be rebutted by proof that the money was in fact received by one, and that the other joined only as matter of form.

J. G. Abbott and *B. Dean*, for the plaintiff.

A. Russ and *D. A. Dorr*, for the defendant.

COLT, J. The defendant is sued upon a probate bond, given by him as one of two executors. A judgment having been ordered for the penalty of the bond, the question before us is how much of the penalty is due in equity and good conscience.

for which an execution should be awarded. Several breaches of the bond are assigned. Upon two of these, namely, the failure to file an inventory, and the failure to render an account within a year, the defendant is liable for nominal damages.

The principal question arises on an alleged breach by the defendant, in negligently permitting his co-executor Wellbrock to appropriate the personal estate of the testator to his own use, whereby it was lost. The bonds given by the two executors were several and not joint, and neither is liable for losses caused exclusively by the default of the other. In order to charge the defendant, the burden is on the plaintiff to show that, in the administration of the estate, the defendant was negligent in the performance of some duty which the law devolves upon him personally. (*Austin v. Moore*, 7 Met. 116, 124.)

A mortgage due to the testator, in the State of Ohio, which by his will the executors were authorized to collect and invest as they might judge to be for the interest of the estate, was collected upon a joint release and discharge, signed by both executors, which was forwarded to the mortgagor through an express company. The money when returned by the express company was received by the co-executor Wellbrock without the defendant's knowledge, and deposited by him in a savings bank in good standing, partly in his own name and partly in his name as trustee. He afterwards took the money from the bank without the knowledge of the defendant, and it was lost to the estate by his misappropriation of it. It is sought to charge the defendant for the loss of this money.

The report finds that Wellbrock had almost exclusive management of the estate; that he was a neighbor and friend of the testator, and had relations more intimate than the defendant with parties interested under the will; and that the defendant was not familiar with laws and forms of business, or with the English language, and was content to leave the business in the hands of his co-executor. It appears that the defendant accounted for all the estate which actually came into his individual possession. In their first account, which was filed, assented to by the parties in interest, and allowed, after the mortgage was collected, the executors charged themselves

with the amount paid thereon; and in a few days after it was allowed, the defendant resigned his trust. Two other accounts were afterwards filed by Wellbrock, the remaining executor, which were assented to by the parties in interest, by which he charged himself with the amount collected on the Ohio mortgage.

It was the right of each executor to receive and hold the funds of the estate. (*Edmonds v. Crenshaw*, 14 Pet. 166.) Neither can be held responsible for the waste or misconduct of the other, unless there be some act or agreement, on the part of the one sought to be charged, by which the estate has gone into, or has been negligently suffered to remain in, the exclusive possession and control of the one by whose misconduct the loss occurs. Thus both were held liable in a case where money was delivered to one executor, and immediately handed over to the other, who appropriated it to his own use. (*Langford v. Gascoyne*, 11 Ves. 333.) But an executor is not held any farther than he is shown to have participated in the misappropriation. "Merely permitting his co-executor to possess the assets, without going farther and concurring in the application of them, does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts, and what he receives and applies, unless he joins in the direction and misapplication of the assets." (*Peter v. Beverly*, 10 Pet. 532, 562; *Brazer v. Clark*, 5 Pick. 96, 104; *Sterrett's Appeal*, 2 Penn. 419.)

It is contended that the defendant is liable in this case, because he must be treated as having concurred in the wrong, by joining in the release by which his co-executor was enabled to obtain possession of the money due on the mortgage, and to mingle it with his own property. The rules which govern the liability of co-executors follow in most respects the rules which prevail as to co-trustees. But, while the latter are not liable for the money which they have not received, although they join in receipts given for the same, it was at one time held that the former were liable in such cases. The reason given for this distinction was that co-executors, unlike co-trustees, have each an independent power over the personal property of

the testator, and may dispose of it, receive pay, and give receipts in their own names, and therefore, that, if one joins with a co-executor in giving a receipt, he does an unmeaning act, unless he intends to render himself jointly answerable for the money. But this rule, which does not seem to have been maintained with entire uniformity, is declared in *Williams on Executors* (6th Am. ed.), 1938, to have been greatly relaxed in favor of executors; and Lord Eldon, in *Shipbrook v. Hinchinbrook*, 16 Ves. 478, declares it to have been broken down.

In *Joy v. Campbell*, 1 Sch. & Lef. 328, 341, Lord Redesdale states the distinction thus: "If a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving." "The true question in all those cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay the co-executor;" "he became responsible for the application of the money just as if he had received it." In *Hovey v. Wakeman*, 4 Ves. 596, 608, Lord Alvanley, the Master of the Rolls, referring to the earlier rule, declared that he would not consider the fact that an executor joins in the receipt as absolutely conclusive; and, in *Scurfield v. Howes*, 3 Bro. Ch. 91, he stated his dissent from the rule, when an executor joins in signing a receipt, if it appears that he joined for conformity only. In *M'Nair's Appeal*, 4 Rawle, 148, 157, the Supreme Court of Pennsylvania declares that "there is no good reason for making executors or administrators liable more than trustees for moneys which they have never actually received, merely because they have joined in a receipt with the co-executor or co-administrator who did receive it. The receipt when proved must always be considered *prima facie* evidence against each of the signers that he received the money; and if he wishes to avoid the consequent liability, it will lie upon him to prove that it was not received by him." The weight of modern authority, both English and American, is that a joint receipt is only presumptive evidence that the money came into the possession or under the control of both. (*Monell v. Monell*,

5 Johns. Ch. 283.) And this presumption may be rebutted by proof that the money was in fact received by one, and that the other joined only as matter of form and for the sake of conformity. (See, also, *Manahan v. Gibbons*, 19 Johns. 427; *Ochiltree v. Wright*, 1 Dev. & Bat. Eq. 336; *Perry on Trusts*, §§ 421-426.)

It is further contended that, even if the defendant cannot be charged upon the ground of his having joined in the release of the mortgage, and having allowed the money due thereon to be collected and deposited by Wellbrock alone, yet that the finding of the master in favor of the plaintiff is supported by the facts stated in the report, that, in April, 1873, within a month after Wellbrock received and deposited the money, and before the greater part of it had been drawn out again by him, "either the defendant was warned and put on his guard, as testified to by one of the parties in interest, or his suspicions were aroused;" and that "since that, whereas before that time receipts for rent had been given in the name of Wellbrock alone, he insisted that thereafter they should be signed by both of the executors."

But this statement of the master is too meagre and ambiguous to enable us to come to a satisfactory conclusion on this branch of the case; and, for the purpose of a fuller and clearer ascertaining and statement of the facts and circumstances relied on to charge the defendant by reason of negligence and breach of duty on his part since the original receipt and deposit of the money by Wellbrock, the case must be recommitted to the master.

Liability of executor for acts of co-executor.—It is familiar law that one executor is not responsible for the *devastavit* of his co-executor any further than he is shown to have known or assented to it. As a general rule, each executor is answerable only for so much of the assets as he receives. *Roach v. Hubbard*, 6 Litt. (Ky.), 285; *Fennimore v. Fennimore*, 8 N. J. Eq. 292; *Knox v. Pickett*, 4 Dessaus. (S. C.) 199; *Kerr v. Waters*, 19 Ga. 136; *Gaultney v. Nolan*, 33 Miss. 569; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Sutherland v. Brush*, 7 Johns. Ch. 17; *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180; *Peter v. Beverly*, 10 Pet. 532; *Kerr v. Kirkpatrick*, 8 Ired. Eq. 137. *Contra*, *Girod v. Pargood*, 11 La. Ann. 329; *Robinson's Estate*, 7 Phila. (Pa.) 61.

Each executor is liable for his own negligence or wrongful act, and for those of his co-executors if he in any way join in it or neglect to prevent it. *Johnson v. Corbett*, 11 Paige, 265; *Clark v. Clark*, 8 Id. 152; *Holcombe v. Holcombe*, 18 N. J. Eq. 413; *Weigand's Appeal*, 28 Penn. St. 471; *Irwin's Appeal*, 35 Id. 294; *Wood v. Brown*, 34 N. Y. 337; *Heath v. Allen*, 1 A. K. Marsh. 443; *Kincade v. Conley*, 64 N. C. 387; *Fulton v. Davidson*, 8 Heisk. (Tenn.) 614.

Or if he, in any way, do any act which enables his co-executor to act fraudulently, or if he make him, actually or constructively, his agent to do an act, and he waste or misapply the assets, then he becomes liable for the wrongful acts of his co-executor, though he himself be without fault. *Edmonds v. Crenshaw*, 14 Pet. 166; *Adair v. Brimmer*, 74 N. Y. 539; *Worth v. McAden*, 1 Dev. & Bat. Eq. 109; *Joseph Black's Estate*, 1 Tucker, 145; *Fisher v. Skillman*, cited above; *U. S. v. Rose*, 2 Cranch's C. Ct. 67.

If one executor permits a co-executor, who he knows to be insolvent, or whom he does not know to be responsible, to take possession of assets, he is liable. *Croft v. Williams*, 23 Hun, 102; s. c. 88 N. Y. 385, and *infra*; *Gates v. Whetstone*, 8 S. C. 244; *Anderson v. Earle*, 9 Id. 460; *Clark v. Jenkins*, 3 Rich. Eq. 318.

Each executor is entitled to receive any part of the assets, and to collect any of the debts, and is accountable as executor for all the money he receives, though he pay it over to his co-executor. *Stewart v. Conner*, 9 Ala. 803; *U. S. v. Rose*, cited above.

In Pennsylvania, in such a case, if he have paid over to his co-executor what he received, he is liable for it only to creditors, being discharged as to legatees. *Brown's Appeal*, 1 Dall. 811; *McNair's Appeal*, 4 Rawle, 148. *Contra*, *Sterret's Appeal*, 2 P. & W. 419.

But in Connecticut all the executors are accountable for what any of them receive. *Knapp v. Hanford*, 7 Conn. 138.

Even though it be received from one of the co-executors. *Edmunds v. Crenshaw*, cited above. And it has been so held in New York. *James Daly's Estate*, 1 Tucker, 95.

An executor is not liable in Kentucky and Iowa for such of the assets as come into the hands of his co-executor only. *Moore v. Landy*, 3 Bibb. 97; *Nettman v. Schramm*, 23 Iowa, 521.

Nor in Delaware for the separate acts of his co-executor. *State v. Belin*, 5 Harr. 400.

If an executor allows his co-executor to retain the assets for a long time, without seeing to their proper investment, he may be held liable. *Hays v. Hays*, 3 Tenn. Ch. 88.

If one executor having possession of choses in action lose them from a failure to exercise ordinary care, his co-executor is not absolutely liable, because he is to be held responsible for his own negligence rather than for that of another. *Hall v. Carter*, 8 Ga. 388.

If executors divide a fund in their joint possession, each taking part, one is responsible for any misappropriation by the other. *Ducommun's Appeal*, 17 Penn. 268.

If the will direct that one of the executors have possession of the property, a co-executor is not liable for a misappropriation, unless he consent to it. *Van Pelt v. Veighte*, 14 N. J. 207.

Co-administrators are, in law, but one person. A receipt from one to the other is not a legal voucher, or of any legal effect. They cannot by mutual receipts release each other from responsibility. *Black's Estate*, 1 Tucker, 145; *Scruggs v. Driver's Ex'rs*, 31 Ala. 274.

The acts of one co-executor are the acts of all. Their action is joint and entire. *Wilkerson v. Wootten*, 28 Ga. 568; *Gilman v. Healey*, 55 Me. 120.

If a legatee take the note of one of two co-executors as security for the payment of his legacy the other executor is discharged. 31 Ga. 564.

An executor who permits his co-executor to act as receiver, without proper supervision, is liable for what he does. *Cressman's Appeal*, 2 Phila. 76; *Hess's Estate*, Id. 243.

If executors unite in selecting an agent they are liable jointly for his misconduct. *Brown's Accounting*, 16 Abb. Pr. (N. S.) 457.

An executor may act as clerk for his co-executor at a sale of the testator's goods, and even receive notes payable to himself and co-executor as executors, without incurring any liability as executor, provided he acted merely as agent, and never had actual possession and control of any of the assets. *Young v. Wickliffe*, 7 Dana, 449.

A co-executor can no more be made personally liable by the new promise of another executor than in any other matter where the validity of the act of the individual executor in binding the estate may be unquestioned. *Shreve v. Joyce*, 36 N. J. Law, 44.

How far an executor is liable for the acts of his co-executor depends very much upon the circumstances of each case. *Noland v. Calvit*, 12 Smed. & M. 273; *Fonte v. Horton*, 36 Miss. 350; *Clarke v. Blount*, 2 Dev. Eq. 51.

If there be a joint administration of the estate, each is surety for the other, and responsible for the proper execution of the whole trust. *Kincade v. Kincade*, 64 N. C. 387; *De Haven v. Williams*, 80 Penn. St. 490; *Roberts v. Thomas*, 32 Ga. 31; *Fonte v. Horton*, cited above; *André v. Rachal*, 3 La. Ann. 574.

Where executors jointly settle the final balance they are jointly liable for the balance so ascertained. *Laroe v. Douglass*, 2 Beas. (N. J.) 308.

If the bond be joint, each is liable thereon as principal, and they are sureties each for the other, both to creditors and legatees. *Newton v. Newton*, 53 N. H. 537; *South v. Hay*, 3 T. B. Mon. 88; *Anderson v. Miller*, 6 J. J. Marsh. 568; *Jeffries v. Lawson*, 39 Miss. 791; *Moore v. State*, 49 Indiana, 558; *Pearson v. Darrington*, 32 Ala. 227. *Contra*, *Turner v. Wilkins*, 56 Ala. 178.

On such a bond each is also surety for the rest as to the sureties on the bond, and is, as to them also, primarily liable. *Ames v. Armstrong*, 106 Mass. 15; *Pritchard v. State*, 34 Indiana, 137; *Overton v. Owens*, 17 Mo. 453; *Newton v. Newton*, cited above. *Contra*, *Collins v. Carlisle*, 7 Ben. (Mo.) 13; *Morrow v. Peyton*, 8 Leigh, 54.

HIGGINS vs. DWEN.

[100 Illinois, 554.]

PRESUMPTION OF DISPOSITION OF ENTIRE ESTATE.—DEVISE OF
LANDS IN CERTAIN LOCALITIES.

A devise of all "properties, real and personal, of every description, in the city of Chicago, county of Cook, and in Ogle county, State of Illinois; also all money and properties which may hereafter come to me," will pass real estate outside the city of Chicago, and in Cook county.

The presumption is that a testator intends to dispose of his whole estate.

APPEAL from the Appellate Court of the First District.

Van H. Higgins, appellant in person.

James Darlon, for appellees.

WALKER, J. This was a bill for a specific performance of a contract for the sale and purchase of forty-two acres of land in Cook county. The vendor tendered a deed, and the purchaser was willing to receive it and pay for the land if he could obtain a perfect title, but denies that the vendor can make such a title.

There are no disputed facts in the case, and it all depends on the question whether James G. Dwen took title to this land by the will of his wife, Ellen L. Dwen, deceased. The circuit court held he did, and the decree was affirmed on appeal to the Appellate Court for the First District, and the case is brought by appeal to this court.

The controversy grows out of the construction of this clause of the will: "I give and bequeath to my husband, James G. Dwen, all moneys and properties, real and personal, of every description, in the city of Chicago, county of Cook, and in Ogle county, State of Illinois; also, all money and properties which may hereafter come to me, by reason of will or otherwise, he to pay all my just debts," etc.

On the one side it is claimed, that the true meaning of the

language gives Dwen only the property in the city of Chicago and in Ogle county, and not in Cook county outside of the limits of the city. On the other hand it is claimed, that title to all real estate situated in the city, and in Cook county outside of the city, as well as any situated in Ogle county, passed to the devisee, under the language of the will. This is the question presented for determination by this record.

The question may not be altogether free from doubt, but we are of opinion the latter view is correct. The language will bear that construction equally well, if not better, than the other. Testatrix held real estate in the city, and in Cook county out of the city, also in Ogle county, and on considering the clause the intention seems to have been to devise the entire property of testatrix to her husband. Had such not been the case, after using the language employed some reservation or exception would have been made to exclude such an apparent intention. The first member of the clause gives "all moneys and properties, real and personal, of every description." Had it stopped here, no doubt could have existed that the intention was to invest the devisee with all of her property, of every description, wherever situated. The further clause, "also all money and properties which may hereafter come to me, by reason of will or otherwise," etc., seems clearly to manifest an intention to devise all of her property to him. These general descriptions are sufficient to have that effect, and show such an intention.

Nor does the local or special description of the location or situation of the property overcome the general description. To upset or overcome this general description, and to repel the intention it implies, language equally clear should have been employed in the local description. It is presumed that a testator, when he makes and publishes his will, intends to dispose of his whole estate, unless the presumption is rebutted by its provisions, or evidence to the contrary. *Smith v. Smith*, 17 Gratt. 268; *Irwin v. Zane*, 15 W. Va. 646.

Applying that presumption in this case, if testatrix did not intend to devise the real estate outside of the city, but in Cook county, to her husband, she would in all probability have de-

vised it to some one else. The fact that she made a will, is a strong presumption that she intended to and did dispose of the whole of her estate. This presumption is strengthened from the fact that language was employed that reasonably bears that construction, and no clause in the will contradicts it.

We are, after a careful consideration of the question, of opinion that the land outside of the city in Cook county passed by the will to James G. Dwen, precisely as did the city property and the property in Ogle county.

The decree of the Appellate Court is therefore affirmed.

Decree affirmed.

See *Griscom v. Evens*, 1 Am. Prob. R. 180; *Moreland v. Brady*, 1 Id. 441.

PATRICK vs. MOREHEAD.

[85 North Carolina, 62.]

**LIFE ESTATE WITH POWER OF DISPOSITION OF FEE.—RULE IN
SHELLEY'S CASE.**

A testator gave to his grandson James, a certain plantation "to hold during his lifetime, and if it shall so happen that he has any lawful heirs, I give it to them or any of them that he may think proper; and should it so happen that he dies without any lawful issue for the land to be equally divided among all my grandchildren." At the time of executing the will testator had a son and daughter who had children living. *Held*, that James was then single but subsequently married and had children. James took a life estate only, and the remainder in fee vested in his children as purchasers.

CONTROVERSY without action for the construction of a will.

James Patrick, Senior, died in 1835, leaving a will dated March 28th, in that year, which was probated at the ensuing May term of the county court.

The material portion of his will is set out in the opinion.

At the time of the testator's death, James D. Patrick was an infant about fourteen years of age and unmarried. He died about the first of May, 1879. About the year 1849 or 1850, several creditors recovered judgments against him amounting to some \$579, upon which executions issued and were levied upon the land in controversy, and the interest of the said James D. in the same was sold by the sheriff and bought by James T. Morehead, Sen. (deceased), and John A. Gilmer (deceased), and Gilmer conveyed his interest in the land to Morehead, Sen.

The court below decided in favor of defendants.

E. S. Martin, for plaintiffs.

ASHE, J. This case comes up by appeal from a judgment rendered in* the court below on a statement of facts agreed upon by counsel in a controversy submitted without action. The statement contains the following clause in the last will and testament of James Patrick, Sen., namely: "I give to my grandson James D. Patrick, the plantation known as the old 'Iron Works,' containing about eight hundred acres of land, to hold during his lifetime, and if it shall so happen that he has any lawful heirs, I give it to them or any of them that he may think proper; and should it so happen that he dies without any lawful issue, for the land to be equally divided between all my male grandchildren."

The plaintiffs claim that James D. Patrick, their father, under the third clause of his grandfather's will, took a life estate in the land, and they, the remainder in fee simple after his death; and that the sheriff's deed to Morehead and Gilmer conveyed only the interest of James D. Patrick, which terminated at his death on the first of May, 1879. The defendants, on the other hand, resist this construction of the will, and claim that James D. Patrick, by the devise to him, acquired an absolute estate in the land, and that they, as heirs of James T. Morehead, deceased, have the fee simple title. And we are now called upon to determine the true construction of the above recited clause in the will of James Patrick, Sen., and to decide

whether James D. Patrick took thereby an estate in fee simple or only an estate for life with remainder to his children or descendants.

It is the well settled rule in the judicial construction of wills, that the intention of the testator shall prevail unless it contravenes some established principle of law. It is therefore our duty to ascertain what the intention of the testator was, and to effectuate that intention if warranted by law in so doing.

There perhaps is no branch of the law that has given rise to more conflicting decisions, or a greater display of legal learning, than the application of the rule in *Shelley's* case to the construction of deeds and wills. But fortunately, in this case, we are not compelled to grope our way through the mist with which the subject has been enveloped by the many clashing decisions, to reach what we conceive to be the correct interpretation of the will under consideration. A few decisions of our own court with some others lead, we think, to a satisfactory solution of the question.

It has been settled upon unquestionable authority, that if an estate be given by will to a person generally with a power of disposition or appointment, it carries the fee; but if it be given to one for life only and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life.

In the case of *Jackson v. Robbins*, 16 Johnson's Rep. 537, the court say: "We may lay it down as an incontrovertible rule that where an estate is given to a person generally or indefinitely with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposition. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion."

In this State, in the case of *Alexander v. Cunningham*, 5 Ired. 430, which was a petition for dower, depending upon the construction of a will which read, "I will to my son, M. W.

Alexander, all my estate, real and personal, for his use and benefit, and then to be divided off and distributed among his children, as he may think proper, that is to say, my land to be used by him and the profits thereof to be to him, but the land to be by him divided and distributed as he may think proper," Chief Justice Ruffin in delivering the opinion of the court, said: "We are of the opinion that the son took but an estate for life, with the power of dividing the land and the other property within his lifetime or at his death among his children as purchasers from the testator; and that until such an appointment, the remainder in fee either vested in the children, or descended to the heirs of the testator. *It is very clear that where there is an express estate for life to one, and a power to him to appoint the estate among certain persons, the first taker gets but an estate for life.*" Same principle in Sugden on Powers, 15 Law Lib. 66; *Bass v. Bass*, 78 N. C. 374.

It is true the word employed in the will, in *Alexander v. Cunningham*, was "children," but that does not affect the appositeness of the authority, for it is evident the testator in this will did not use the words "lawful heirs" in their technical sense, but as synonymous with issue or children. The father, the brothers and sisters, and aunt of James D. Patrick were all alive at the date of the will. Several of them were the objects of the testator's bounty. He knew if James D. died immediately after the publication of his will that his brothers and sisters would be his heirs, and the very male grandchildren, to whom the estate was devised in the event of James D. Patrick's dying without issue, would have been his heirs, if all others standing in nearer degree had died before him. If he meant heirs general, why say "if it should so happen that he has any lawful heirs," &c., knowing at the time that the persons were then living who must be his lawful heirs, in the event of his dying, and that he must continue to have such heirs, so long as those to whom the land was limited in remainder continued to live. The words "if it shall so happen," &c., refer to the future, not to the class of heirs the devisee then had, but to a class yet to come into existence, and who could only be composed of his lineal descendants. If this be so, and we think it

is too plain to admit of controversy, then the will should be construed, as reading, I give unto my grandson, James D. Patrick, the plantation, &c., to hold during his lifetime, and if it should so happen that he has any heirs of his body, I give it to them, or any of them that he may think proper, &c. And if the devise had stopped with the words "I give it to them," it would have been a case clearly falling within the rule in *Shelley's* case, and by operation of the act of 1784, the defendants would have a title in fee simple. But the superadded words "or any of them that he may think proper," have an important bearing upon the question of interpretation, and we think prevent the application of the rule.

In *Allen v. Pass*, 4 Dev. & Bat. 77, Judge Gaston used the following language: "Before the application of the rule in *Shelley's* case, it is always proper first to ascertain whether, on the true interpretation of the words of the gift, there is a limitation of the inheritance in remainder to the *heirs*, or to the *heirs of the body*, of one to whom a precedent estate is given—such a limitation does exist when the limitation is to them in the *quality of heirs*—embracing the same number—in succession of objects and conferring the same extent of interest, as would be embraced and conferred when the inheritance has been limited to the ancestor." He proceeds to say that when these requisites are embraced in the terms of a devise, the rule in *Shelley's* case applies. But he adds: "On the other hand, as the law will not entrap men by words incautiously used, if in the limitation of a remainder by any instrument of conveyance, the phrase *heirs* or *heirs of the body* be expressed, but it is unequivocally seen that the limitation is not made to them *in that character*, but simply as a number or class of individuals thus attempted to be described, then the whole force of the phrase is restricted to this designation or description—it shall have the same operation as the words would have, of which it is the representative; there is not in fact a limitation to *heirs*, and of course there is no room for the application of the rule."

And in the more recent case of *Ward v. Jones*, 5 Ired. Eq. 400, Chief Justice Pearson says: "The rule in *Shelley's* case only applies where the *same persons* will take the same

estate, whether they take by descent or purchase; in which case they are made to take by descent, it being more favorable to dower, to the feudal incidents of seignories, and to the rights of creditors, that the first taker should have an estate of inheritance; but where the persons taking by purchase would be different or have different estates, then they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills, take as purchasers."

In our case it was by no means certain, when the will was made, whether one or more or all of the issue which Jas. D. Patrick might happen to have, would take the estate. It was in his power, if he would have, as he did, more than one child, to give the land to one of them; and that one would not have taken the same estate which he would have taken if the land had come to him by descent, for in the latter case he would have taken as tenant in common with his brothers and sisters, but as appointee the whole estate would have vested in him; and we do not conceive that it can make any difference that the power has not, in fact, been exercised. It is the existence of the power that affected the quality of the estate. It could not be foreseen whether it would be exercised or not, but it was enough to prevent the application of the rule, that the limitation to the heirs of the devisee was coupled with a power, the exercise of which would prevent them from taking the same estate they would have taken if the land had come to them by descent from him.

Upon the authorities above cited, and the deductions we have drawn from them, we are of the opinion that the judgment rendered in the court below was erroneous and that the plaintiffs are entitled to the land described in the pleadings in fee simple. The judgment of the Superior Court of Rockingham is therefore reversed and judgment must be rendered in this court in behalf of the plaintiffs.

Error. Reversed.

See, as involving the rule in Shelley's case, *Stillwell v. Knapper*, 1 Am. Prob. R. 211.

MANNERS vs. PHILADELPHIA LIBRARY COMPANY.

[98 Penn. St. 165.]

CHARITABLE USE.—CONDITION IN BEQUEST FOR LIBRARY TO EXCLUDE CERTAIN BOOKS AND PUBLISH OTHERS CLAIMED TO BE ATHEISTICAL.

A direction that the trustees of a public library shall not exclude any book because of its differing from the conventional notions on the subjects of theology, morals, medicine, etc., does not avoid the trust; it is a negative recommendation only.

A direction to publish certain works which are averred to be atheistic, coupled with a gift to found and endow a library, does not avoid the gift; it is not a condition precedent, and if illegal, it will be disregarded.

Where a charity is a residuary devisee of land, a purchase by the testator, within thirty days of the testator's decease, though expressly in trust for that charity, passes to the charity as residuary devisee.

APPEAL from the Court of Common Pleas of Philadelphia county.

Bill in equity to contest the validity of trusts and devises in the will and codicils of Dr. James Rush, deceased.

By his will, dated in 1866, Dr. Rush devised the whole of his estate, after payment of debts, annuities and legacies, to H. J. Williams, in trust, to select and purchase a lot and erect thereon a building, according to directions to be given by the testator; and upon its completion, to convey the same to the Library Company of Philadelphia, for the uses of their library. Proviso, that before conveyance, the library company should bind themselves to certain conditions not important to be here stated. And also, in trust, to assign the residue of the assets to the company, upon certain trusts as to administration, the surplus income to be applied to the increase and extension of the library.

By the first codicil of 1866, he directed that certain rules for administration should be inserted in the act of assembly, which would be required to carry out the provisions of the will. He then added a clause, which is set out in the judgment of the court, on which the charge of immorality turns.

And also a clause, directing the devisee, on the refusal of the library company to accept, or their failure to comply with, the preliminary stipulations, to found and endow a library, with the estate devised to him; and added that the annuities, as they fall in, will be amply sufficient for the legitimate purposes of a library.

He remarked, that he was compelled to make his will by separate instruments, lest by his declaration a month after a formal and harmonious testamentary disposition, it should be avoided.

By a codicil of 1867, he directed that the whole of his residuary estate should be expended on the purchase of the lot and erection of the building, leaving the library company only a sufficient income to defray ordinary and strictly appropriate expenses. He then directed that every ten years or oftener, editions of his works should be published exactly as he left them. And then declared the library company a trustee for the objects and purposes of his will; and gave certain visitatorial powers to a commercial institution in this city and to all citizens.

All these documents were admitted to probate in May, 1869. The bill was filed in March, 1878.

The defendants demurred, and the court below sustained the demurrer.

F. Carroll Brewster and Wm. A. Porter, for appellants.

W. H. Rawle and R. C. McMurtrie, for the library company.

PAXSON, J. This was a bill in equity filed in the court below by Robert Manners, of London, one of the heirs-at-law of Dr. James Rush, deceased, against Henry J. Williams and The Library Company of Philadelphia. Subsequently Elizabeth Murray Rush, a daughter of James Murray Rush, deceased, and a grand-niece of the said James Rush, upon application to the court below, was allowed to become a party plaintiff. The defendant Williams was the executor of the last

will and testament of Dr. Rush, and the defendant corporation was the residuary legatee under his will, and the recipient of nearly the whole of his large estate. The object of the bill, briefly stated, was to recover from the defendants the residuary estate, and the court below was asked to declare that the provisions of the testator's will in regard to the Philadelphia Library were impracticable and impossible of execution, or if capable of execution, that they were contrary to public policy and sound morals, and that the defendant Williams be declared a trustee for plaintiff. The defendants filed separate demurrers, upon which issue was joined. The demurrers were sustained, and the bill dismissed, with costs. It is the appeal from this decree we are now called upon to consider.

We need not dwell at length upon that part of the bill which charges that the provisions of the will are impossible of execution. The argument upon this branch of the case rests upon the fact that the testator, in and by the last codicil to his will, directed that the "whole remainder" of his estate should be expended "in the purchase of a lot and the erection of the library building, construction of book-cases, &c., leaving the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution." It was urged that here was a direction for the construction of a magnificent shell without any provision to purchase books; that to erect a building of the character indicated, and line its walls with shelves upon which no books could ever be placed, would not be creating a library, but, on the contrary, would defeat the very object the testator had in his mind, and would serve no useful purpose which a court of equity would be under a duty to enforce as against the heir-at-law. It is sufficient to say, by way of answer to this, that the allegation of want of funds to sustain the library is unfounded. The codicil relied on by the plaintiffs provides that the annuities, amounting to \$10,400, shall be applied to the support of the library as they shall respectively fall in. In addition, this was the gift of a building to a library company already organized, which had been in existence for many years, and, as we learn from the will of Dr. Rush, with funds and income of its own. The

chief object of the testator was to enlarge the scope of a charity already in existence, not to found a new one. It cannot be seriously contended that the devise of a building to a library company for the safe keeping and convenient use of its books is void or incapable of execution, because unaccompanied with the bequest of a fund to purchase books, pay the taxes, or provide for any of the other expenses of such institutions.

The entire weight of the able arguments on behalf of the plaintiffs was brought to bear upon the single point, that to carry out the provisions of the will of Dr. Rush would be contrary to every principle of good morals and religion, and against the policy of the law; the amended bill expressly charging "that the works directed by the said Dr. James Rush to be published every ten years, and earlier and oftener if called for, in the paper writing dated April 18th, 1867 (last codicil), contain infidel and atheistical sentiments, teachings and arguments, and that said works deny the truths of the Christian religion, and of revelation, and the existence of a God; and the plaintiff charges that the effect of carrying out and executing said trust would be the propagation of infidel and atheistical doctrines, and would be contrary to good morals and to law." The amendment containing the foregoing grave averments was filed in the court below after the case had been argued and the day before it was decided. The defendants contend that it was filed irregularly, and ought not to be considered here. Yet it comes up regularly, no motion has been made here or in the court below to purge the record, and for the purposes of this case we shall consider it as before us, without, however, deciding any question of its regularity. The only other matter relied on by the plaintiffs to sustain their position is the fifth section of the first codicil of the testator's will, which is as follows:

"I do not wish that any work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency."

Following immediately after, in the same section of the

same codicil, the testator adds, evidently in explanation and vindication of the above, the following:—

“Temperate, sincere and intelligent inquiry and discussion are only to be dreaded by the advocates of error. The truth need not fear them, nor do I wish the Ridgway Branch of the Philadelphia Library to be encumbered with the ephemeral biographies, novels and works of fiction or amusement, newspapers or periodicals, which form so large a part of the current literature of the day. The great object of a public library is to bring within the reach of the reader and student works which private collections do not and cannot contain, and which in no other way could be accessible to the public. Its excellence will depend, not upon the number of its volumes, but upon their intrinsic value; and I wish this principle to be carried out by the managers, who, I hope, will never be influenced by the too common ambition for mere numerical superiority.”

The plaintiffs contend that the will and codicils of Dr. Rush contain a foundation for atheism and infidelity; that the law, while tolerating the freest discussion, will never lend its hand for the protection and support of immorality; that in a land where religion and sound morals are recognized as the foundation stones of government, no trust can exist for the protection of that which destroys the State.

No fault is found with this statement of the law. It may be regarded as settled in Pennsylvania, that a court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality or hostility to the existing form of government. A man may do many things while living which the law will not do for him after he is dead. He may deny the existence of a God, and employ his fortune in the dissemination of infidel views, but should he leave his fortune in trust for such purposes, the law will strike down the trust as *contra bonos mores*. We need not elaborate this question nor extend the illustrations. The whole subject is thoroughly discussed in a number of cases which fully sustain the principle above stated. (See *Updegraph v. The Commonwealth*, 11 S. & R. 394; *Vidal v. Girard's Executors*, 2 Howard, 127; *Zeisweiss v. James*, 13 P. F. Smith, 465.) In the case last cited,

the testator devised all his property to his grand-nieces for their lives and the life of the survivors, remainder to "The Infidel Society in Philadelphia, hereafter to be incorporated for the purpose of building a hall for the free discussion of religion, politics," &c. This court said, referring to the trust for the infidel society: "It is plain that no court would ever undertake to administer such a charity."

This brings us to the examination of the grounds upon which it is alleged that the trusts of Dr. Rush's will are not fit to be enforced in a state where good order and sound morals prevail, and where Christianity is the popular and recognized religion.

Much stress is laid upon the expression by the testator in the first codicil, of the wish that no work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subject of science, government, theology, morals or medicine. This language is construed by the plaintiffs as a direction or command that every work *shall* be included, however much it may be at variance in its teachings or doctrines from the ordinary or conventional opinions on the subject referred to, provided it contains neither ribaldry nor indecency. That is to say, all works advocating atheism, infidelity and immorality generally shall be included; and that no discretion is left to the executor under the will to exclude such books. While the words "I wish" in a will are sometimes construed as a command and not as merely precatory, we do not so regard them here. The testator evidently intended to express a preference merely, and however binding the executor might regard it in *foro conscientiae*, it would not be held to be binding upon him legally.

We must examine this clause of the will from the testator's standpoint, so far as that is possible, in order to ascertain his meaning in the paragraph in question. He was an educated man, of scholarly habits, and of no mean scientific attainments. The ample fortune which he enjoyed gave him the opportunities of indulging his tastes fully. He says in his will: "My property has enabled me to devote, happily and undisturbed, the latter part of my life to pursuits of scientific inquiry, which

I have deemed to be more beneficial than the mere common enjoyment of an ample fortune." In his researches in the paths of science, even in the line of his own profession, it is not unlikely he fully realized that the conventional opinions of yesterday may not be those of to-day, and are not likely to be those of to-morrow.* He possibly remembered that when he commenced the practice of medicine, a patient burning with fever was not allowed a breath of fresh air or a drink of cold water; that bleeding was resorted to in almost every disease; that the introduction of anæsthetics was by some regarded as impious and unscriptural, and an attempt on the part of females to defy the primeval course; that before his day, Harvey's theory of the circulation of the blood was treated with derision and cost that eminent physician a large portion of his practice, and that Jenner's discovery of vaccination was denounced by his own profession as empirical, and by the clergy as wicked. And outside of his own profession, in science, government, theology and morals, he would have seen substantially the same thing; one discovery treading quickly upon the heels of another; one conventional opinion after another giving way before the spread of learning and the advance of science. From his own experience in his various researches the testator probably realized the importance and value to educated men of a public library which should place within their reach such books as are not readily accessible. With a desire to promote temperate, sincere and intelligent inquiry and discussion, he imposes no restriction upon the character of the books except that they shall not contain either ribaldry or indecency. He would make his library a place where the student, whether of science, government or theology, could find the information for which he longed. His recommendation in regard to books was negative merely. Beyond his own writings, which will be noticed hereafter, he directed no book to be placed upon the shelves. This is as true in regard to theology as to any of the other subjects mentioned. It can hardly be said that the interests of Christianity and sound morality require that the student of theology shall be debarred access to all books that may be regarded as objectionable from an orthodox standpoint. He

is best armed to defend Christianity who is familiar with arguments against it. To enforce such a rule would exclude from this library a vast amount of the choice literature of the past; the works of authors who merely wrote according to the light of their day and generation. We may now safely enjoy all that is good of their writings. The world has outgrown their errors.

The amendment to the bill presents a different question. It is there distinctly charged that the works of Dr. Rush, which by his will he directs to be published every ten years, contain atheistical and infidel sentiments, and deny the truths of the Christian religion, of revelation, and the existence of a God. As this averment comes up upon the record, and stands unchallenged, we must assume it to be true. The works of Dr. Rush are not before us, and we state merely the legal effect of the pleadings. We have already seen that no trust can be sustained in Pennsylvania for the propagation of such sentiments. Hence, if the primary object of the trusts of the will is to disseminate infidel views, or to attack the popular religion of the country, it would be the duty of a court of equity to declare such trusts to be against public policy and therefore void. But the devise in his will is to a public library; to extend the usefulness of one already in existence if his devise is accepted, or to found a new one if his munificent gift is declined. This is an object which the law favors, and a trust which equity will administer. It was recently held by this court that the Philadelphia Library was a public charity, and its property, the very building in question, free from taxation for that reason. (*Donohugh v. Library Company*, 5 Norris, 306.) The devise to the library being for a lawful purpose, and having vested, and the primary intent of the testator being to assist what this court has declared to be a "purely public charity," is the intent of the testator to be defeated, and the trust set aside because one of the directions or conditions of the bequest as to a secondary intent may happen to be illegal. The answer to this question is not difficult. It is at least doubtful since the passage of the act of 26th of April, 1855 (Pamph. L. 331), whether the heir-at-law has any standing in court upon a bill to set aside the trusts of a will. Conceding,

however, that said act does not apply to this case, the authorities are clear that the law will strike down the unlawful direction and leave the primary intent untouched. To this extent the doctrine of *cy pres* is part of the law of Pennsylvania. We need not load this opinion with an extended citation of authorities. The subject is fully discussed and the authorities collected in the recent case of *City of Philadelphia v. Girard's Heirs*, 9 Wright, 9. The principle is there stated that "it is a rule of law and equity that where a vested estate is distinctly given, and there are annexed to it conditions, limitations, powers, trusts (including trusts for accumulation) or other restraints relative to its use, management or disposal, that are not allowed by law. It is these restraints, and the estates limited on them that are void, and not the principal or vested estate." The clause in Dr. Rush's will regarding the character of the works to be placed in the library, and the provision in the codicil for the publication of his own works are not conditions precedent to the vesting of the estate. If they are unlawful they will be disregarded. If the fact be that the testator's works are of the character alleged in the bill it is not likely the defendants will ever publish them. No court would compel them to do so.

The averment in the sixth paragraph in the bill, that the library company have not finally accepted the devises contained in the will and codicils, and have declined to accept the same upon the trusts and conditions therein contained, does not help the plaintiffs. The bill does not allege, that the time has yet arrived for the defendant company to elect or refuse the trusts referred to; while it is expressly provided in the will, that in case of such refusal, the estate shall be held by the executor in trust "to found and endow a public library, entirely distinct from and independent of the Philadelphia Library, to be named and called the Ridgway Library, under the rules, regulations, conditions and stipulations in my said last will, and the codicils thereto expressed and contained."

The twelfth paragraph of the bill avers, "That within one calendar month prior to his decease, the said Dr. James Rush purchased a lot of ground situate on the southeast corner of

Broad and Christian streets, in the city of Philadelphia, which said lot was purchased by him, and was subsequently conveyed for a charitable use, as set forth in the trusts and conditions contained in the aforesaid writings, alleged to be his last will and codicils."

It was further averred that said transaction is void by reason of the purchase for the use of said charity having been made within one calendar month of the decease of the said testator, contrary to the provisions of the act of assembly of the commonwealth of Pennsylvania, entitled, "An act relating to corporations and estates, held for corporate, religious and charitable uses," approved 26th April, 1855. It was urged, that as the facts are admitted by the demurrer, upon this point at least, the plaintiffs are entitled to a decision in their favor. It is true that a demurrer admits all the facts well and sufficiently pleaded. It requires but a glance at this section of the bill, however, to see that it is evasive and uncertain. There is no statement how the lot was so purchased and conveyed; nor whether it was conveyed by the testator or to the testator; nor when, by whom, or in what manner it was conveyed for a charitable use. The act of assembly is in derogation of the common law right of conveyance, and the averments of the bill must be so distinct and clear as to bring the case within the terms of the law. Instead of these defects being cured by the demurrer, the law has always been, that upon special demurrer, such defects are fatal. One of the principal rules laid down by Stephen in his Treatise on Pleading, at page 378, is the following: "Pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading." To the same point is the third of Bacon's maxims: "You shall find, that in all imperfections of pleadings, whether it be in ambiguity of words and double intendments, or want of certainty and averments, or impropriety of words, or repugnance and absurdity of words: ever the plea shall be strictly and strongly taken against him that pleads." And Evans, in his work on Pleading, referring to the above rule laid down by Stephen, says, at page 188: "This rule, which

is applied by our law to all writings whatever, has its origin in the just and obvious policy of discouraging a crafty ambiguity. Its application is more rigorous in some cases than in others. Rigor is more or less proper as the probability of a designed ambiguity is greater, and that of ignorance less. In pleadings which are, or ought to be drawn with great care, by men thoroughly acquainted with the effect of language, a case proper for the utmost rigor is presented." A host of authorities are cited by Stephen in support of his text. We need not refer to them, as the rule is well settled.

Aside from the defective averments in the bill, it is manifest, from an examination of Dr. Rush's will, that the provision for the endowment of this library was written years before his death, and that the purchase of the lot in question was but an investment, or a change of investment, and has no more significance for the purposes of this case than if he had invested a corresponding amount in city loan or other securities. It has never been held that where a testator devised the bulk of his fortune to a charity that a change of investment made within one calendar month prior to his death, avoided the prior devise or trusts of his will. Such a rule would seriously embarrass the management of his property by a testator and serve no useful purpose. In *Schultz's Appeal*, 30 P. F. Smith, 396, the testator devised his estate unconditionally to an individual with the intent to evade the statute, and it was held that the devisee not being a party to the fraud, the estate vested in him, and the case was not within the statute, though he designed to carry out the testator's verbal directions, "the bequest was not within the words of the statute."

We need not pursue the subject further, nor discuss the minor questions involved. With the failure to establish the main proposition, that the trust fails by reason of the objectionable character of Dr. Rush's works, the superstructure of this bill crumbles.

The decree is affirmed and the appeal dismissed at the costs of the appellants.

See *Haines v. Allen*, *ante*, p. 242, and references in note.

SHAEFFER, EXECUTOR vs. SHAEFFER.

[54 Maryland, 679.]

WHAT ARE PROPER FUNERAL EXPENSES?

Disbursements for dinner and horse feed furnished to persons who attended deceased's funeral are not proper charges as part of the funeral expenses. Such a claim cannot be controlled or aided by a custom of the neighborhood.

THE facts of the case are fully set forth in the opinion of the court.

William P. Maulsby, for appellant.

John E. Smith and *William E. McKellip*, for appellees.

ALVEY, J. This action was brought against the defendant in his representative character of executor; and the claim sought to be recovered is for work, services, and board furnished the deceased in his lifetime, and for things charged as funeral expenses. The case was tried on the general issue plea of non-assumpsit.

We think the court below was clearly right in its ruling as stated in the first bill of exception. The fact allowed to be proved was the only part of the offer by the defendant that would appear to have any relevancy to the issue on trial; and all the rest of the offer, therefore, was properly excluded. To have admitted in evidence all the offer as made, would have tended to raise a false issue before the jury, and that the court should always be careful to avoid.

The principal subject of controversy on this appeal is the claim of the plaintiff for \$100, charged in his account as for funeral and other expenses. As we have stated, the action is against the defendant in his representative character as executor, and the proof on the part of the plaintiff shows that the charge in his account of \$100, as for funeral and other expenses, was for dinner and horse feed, furnished at the house of the plaintiff on the day of the burial of the deceased, but after the funeral had taken place, to persons who had attended

the funeral. The deceased had lived for a considerable time with the plaintiff, and died in the house of the latter. On the day of the funeral, the body was taken to a church some five miles distant for interment, and after the funeral services were over and the body buried, the plaintiff caused an invitation to be given to those present to repair to his house for dinner; and the proof shows that some seventy or eighty persons accepted the invitation and dined with the plaintiff, and that twenty-five or thirty horses, of parties so dining, were also fed by the plaintiff. It nowhere appears that this entertainment was provided at the instance or request of the defendant; but it seems to have been the unsolicited and voluntary act of the plaintiff. The charge is sought to be maintained by what is said to be a custom in the neighborhood.

By the Code, Art. 93, sec. 5, as modified by the Act of 1874, ch. 155, it is provided, that funeral expenses shall be allowed at the discretion of the Orphans Court, according to the *condition* and *circumstances* of the deceased. And, as has been very properly said, no precise sum can be fixed to govern in all cases. It will vary in every instance, not only with the station in life of each particular decedent, but also with the price of the requisite articles at the particular place; and it must also vary with respect to the circumstances, and extent of the decedent's estate. 2 Wms. Ex'rs, 831. For while a particular allowance for funeral expenses out of an ample estate to pay debts and legacies might be regarded as in all respects reasonable and proper, such an allowance might be far otherwise as against creditors of an insolvent estate. Hence the allowance is placed at the discretion of the Orphans Court, supposing that that court would exercise a sound and rational discretion, with reference to the circumstance of each particular case. The plaintiff's claim was laid before the Orphans Court, and that court declared that the account would pass when paid; but that order has no effect to establish the validity of the claim as against the opposition of the executor. He is entirely at liberty to contest the claim, and the plaintiff is required to prove it as if no such order had passed. Code, Art. 93, secs. 100, 101. The whole import of the order is, that if the exec-

utor should think proper to pay the claim he would be entitled to receive credit therefor in his account.

But is the charge for dinner and horse feed furnished to persons who had attended the funeral of the deceased, a proper and legitimate charge as part of the funeral expenses? Clearly, we think not. Nor can the claim be aided or controlled in any manner by neighborhood custom. If custom could enter into the matter, and shape the claim of the plaintiff, that custom, if allowed to be uniform in its operation, would to a large extent, control the discretion of the Orphans Court, without respect to the condition and circumstances of the deceased. If custom could authorize the giving of funeral dinners at the expense of the estate of the deceased, the allowance therefor would be proper, whether the estate proved to be solvent or insolvent, or whether the number of persons attending them be eighty or five hundred, or even more. Such entertainments are not the ordinary, and certainly not the necessary, incidents of funerals, nor are they within the contemplation of the law which provides for the allowance of reasonable funeral expenses, having reference to the condition and circumstances of the deceased. Those who think proper to furnish such entertainments must do so from motives of hospitality, and not with design of charging the estate of the deceased.

There is no evidence or pretence that the dinner and horse feed were furnished at the special instance and request of the defendant; but if such had been the case, there could be no recovery in this action against the defendant in his representative character. In such case, recovery could only be had against the defendant personally. *Curtis's Ex'rs v. Bank of Somerset*, 7 H. & J. 25; *Corner v. Shew*, 3 M. & W. 350, 356; 2 Wms. Ex'rs, 1525.

It follows from what we have said, that the court below was in error in granting the first and second prayers offered by the plaintiff, and in rejecting the first, second, third, fourth, fifth, fourteenth, fifteenth, sixteenth and seventeenth prayers offered by the defendant. Of these prayers, those on the part of the plaintiff affirm the right to recover for the dinner and horse feed, and those on the part of the defendant deny such

right. We think the court below was right in rejecting all the rest of the defendant's prayers, some because they were misleading, and others for the want of evidence upon which to found them. The judgment will therefore be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded.

See *Samuel v. Estate of Thomas*, *ante*, p. 100, and cases in note.

JOHNSON vs. JOHNSON.

[98 Illinois, 564.]

DEVISE IN FEE OR FOR LIFE.—WHEN CHARGE ON DEVISEE ENLARGES ESTATE.

Real estate was devised to testatrix's daughters, "to be divided equally," coupled with the statement that in case of the death of a daughter without issue her share should go to her sisters, and if there were issue it should be divided equally between her offspring. In consideration of which the daughters were to provide for their father if he became destitute. *Held*, that the daughters did not take a fee but only a life estate.

The imposition of a charge upon a devisee operates to enlarge the estate granted him only where the terms of the devise are indefinite.

Surr in chancery to partition certain real estate alleged to be held by the parties as tenants in common.

The questions presented arise on the will of Sarah M. Peck, the material portion of which is set forth in the opinion.

Helen M. Peck and Marian A. Peck, the wife of Egbert Johnson, survived the testatrix. Marian A. Johnson had one son born in 1878.

The testatrix died in 1875.

Page and *Plum* for plaintiffs in error.

H. F. Vallette, for defendants in error.

CRAIG, J. The only question presented by this record is, whether, under the fourth clause of the will of Sarah M. Peck, deceased, her daughters, Marian A. Johnson and Helen M. Peck, took a life estate or the fee in and to the land therein described. The provision of the will in question is as follows:

4th. "I give and bequeath to my above-named daughters an undivided third of ten acres of land, situated in the south-east quarter of section 4, town of Lake, county of Cook, State of Illinois, to be divided equally. In case of the death of either of the above daughters without issue, the share of the deceased shall revert to the remaining daughter. If either die leaving children, deceased's share shall be divided equally between her offspring. In consideration of the above bequests, which shall be shared equally between my above-named daughters, if their father, Charles E. Peck, shall become destitute, they shall provide him with the actual needs of life."

In making the will, if the testator had stopped at the first concluding clause with the word "equally," then it is clear the two daughters would have taken the fee in the property devised; but the testator, for some reason, saw proper not to do so, but added another provision, which materially changes and limits the clause first written. If, in placing a construction on the will, the latter clause could be rejected, then there would be no difficulty in holding that the fee passed to the two daughters; but we are aware of no authority which would sanction a construction of that character. One of the familiar rules of construction of a will, or other instrument of writing, is, where there is uncertainty and doubt, all of its parts should be considered together, and, if possible, give every clause and provision effect according to the intention of the maker. *Brownfield v. Wilson*, 78 Ill. 467.

If, in this case, full force and effect are given to each clause of the will, what estate in the land devised did the testator intend to give to the two daughters? Was it an estate in fee, or for life only? If the language used in the last clause is to be considered and given force and effect, which we are bound

to do, it seems plain that the daughters took only a life estate in the property.

In *Bergan v. Cahill*, 55 Ill. 160, it was expressly held that a devise of the fee may be restricted by subsequent words in the will, and changed to an estate for life. Here, the testatrix, after devising the property to her two daughters, declares that if either die leaving children, the share of the daughter so dying shall descend to her offspring, and be divided equally between them. This is a plain and unambiguous declaration, and means, in as plain terms as the English language could well express it, that the daughters are to hold this land for life, and upon their death it shall descend to their children, who shall take the fee.

It is, however, urged, that the personal charge upon the daughters in respect of the property, for the support of the father, is conclusive evidence of the intention of the testatrix to pass the fee. We perceive no reason why a charge may not be placed upon the devisee of property devised for life as well as property devised in fee, and we are well satisfied that where, by the terms of a will, it clearly appeared that the testator devised a life estate, a charge imposed upon the devisee, however great, in consideration of the bequest, could not change the construction of the will. If the devise was indefinite, a different rule would prevail.

The doctrine on this question is clearly stated in Jarman on Wills, vol. 2, page 126, as follows: "The rule under consideration, however, is confined to indefinite devises; for where the direction to pay is imposed on a person to whom there is given an express estate for life, or an estate tail (whether limited in express terms, or arising constructively by implication from words introducing the devise over), the charge is inoperative to enlarge such estate for life or estate tail to a fee simple." See, also, *Goodtitle v. Edmunds*, 7 Durn. & E. 635; *Willis v. Lucas*, 1 P. W. 474; *Denn v. Slater*, 5 Durn. & E. 335; *Doe v. Owens*, 1 Barn. & Adol. 318.

There is nothing indefinite in regard to the devise in this case, but, on the contrary, it is clear and definite. The terms

of the will are so plain, that there is no room for doubt in regard to the intent of the testator.

We are of opinion that the decision rendered in this case, that the daughters took only a life estate, was correct, and it will be affirmed.

Devise for life when enlarged to fee by personal charge.—It is the common law that where there is a *definite* devise for life no charge imposed upon the devisee can enlarge the estate to a fee. But in case of an *indefinite* devise, it is usually held that charges operate to create a fee.

A personal charge will not enlarge to a fee an estate specially limited entail,—*Dixon v. Rowage*, 2 Watts. & S. 142; *De Witt v. Eldred*, 4 Id. 414; *Den v. Small*, 20 N. J. Law, 151; *Burkhart v. Bucher*, 2 Binn. 455; *Lithgow v. Kavanagh*, 9 Mass. 161; or for life,—*Fisher v. Herbell*, 7 Watts. & S. 63; *Gernet v. Linn*, 31 Penn. St. 94; *Stuart v. Walker*, 72 Me. 146; a. c. *ante*, page 79, and note; *Anderegg v. Ross*, 18 Indiana, 418; *Miller v. Shields*, 55 Indiana, 71; *Moore v. Dimond*, 5 R. I. 121; *Markille v. Roghood*, 77 Illinois, 98; *Goodell v. Hubbard*, 32 Mich. 47; *Bowers v. Porter*, 4 Pick. 198; *Den v. Cook*, 2 Halst. (N. J.) 41; *Tanner v. Livingston*, 12 Wend. 83.

Where a testator devised a house to his wife, and the remainder of his property, viz.: to his wife one part, and to each of his six children one part, adding, "My mother-in-law, A. B., to live in the house with my wife and children, or, if she prefers it, to receive in lieu thereof \$300," it was held that the widow by accepting the devise became contingently liable for the charge, and that her estate was thereby enlarged to a fee simple. *Coane v. Parmentier*, 10 Penn. St. 72.

A. devised 25 acres to his son G., and then added, "I give to my wife M. all the remainder of my homestead farm, and everything belonging or attached to said farm, except the 25 acres given to G." The wife was also required to pay all debts and certain legacies, and to give a younger son a good education. It was held that the wife took a fee in all the homestead except the 25 acres. *Jones v. Leeman*, 69 Me. 489.

The following cases contain similar doctrine: *Wharton v. Morague*, 63 Ala. 201; *Clark v. Barton*, 51 Indiana, 165; *Baldwin v. Bean*, 59 Me. 481; *Kennedy's Appeal*, 60 Penn. St. 511; *Spraker v. Van Alstyne*, 18 Wend. 200; *Fox v. Phelps*, 17 Id. 398; a. c. 20 Id. 437; *Dumond v. Stringham*, 26 Barb. 104; *Buckley v. Coose*, 1 N. J. Eq. 511.

WOOD'S APPEAL.

[92 Penn. St. 379.]

PLEDGE OF TESTATOR'S STOCK BY EXECUTOR FOR PERSONAL DEBT.—BONA FIDE PLEDGEE'S RIGHTS.

One of several executors placed certificates of stock belonging to his testator with a broker as collateral security for his personal indebtedness, delivering also a blank bill of sale and power of attorney executed by himself as executor. The broker pledged the stock to one who advanced money thereon, believing the broker to be the real owner of the stock. *Held*, that there could be no recovery of the stock by the remaining executors until the advances made thereon were paid.

BILL to compel delivery to plaintiffs as executors of Charles S. Wood, deceased, of certain certificates of stock in the Cambria Iron Company, standing in the name of decedent at the time of filing the bill, but in the possession of defendant D. C. Wharton Smith.

George R. Wood, defendant in this action, was a co-executor with the plaintiffs. Without the knowledge of his co-executors he speculated in stocks through MacDowell & Wilkins, stockbrokers, transferring to them as margin for his operations, shares of the Cambria Iron Company's stock. These shares stood in the decedent's name, and each certificate was accompanied by a blank bill of sale and power of attorney to sell and transfer, signed "George R. Wood, acting executor."

MacDowell & Wilkins transferred some of the certificates so pledged to D. C. Wharton Smith, a banker, as collateral to advances of money made by him to the firm. One certificate was witnessed by MacDowell and the other by Wilkins. Smith testified that he believed MacDowell & Wilkins owned the stock, and he dealt with them as owners.

The court below dismissed plaintiff's bill.

J. B. Townsend and *R. C. McMurtrie*, for appellants.

L. W. Smith and *Wm. Henry Rawle*, for appellees.

TRUNKY, J. The able and elaborate report of the master so well sustains his conclusion and the decree of the court, as to obviate labor in affirmance.

The appellants concede : 1. That where the owner sells stock and gets his price, and delivers the certificate, together with a blank bill of sale and irrevocable power of attorney, signed by himself, the title vests in the purchaser ; and 2. When a living owner signs such papers in blank, if he has not actually sold and got his price for the stock, by intrusting them to another, he delegates all his powers in respect to the stock, which being unlimited, he by estoppel will lose his property, if his agent abuses his confidence. They deny that such papers pass title by delivery, and allege, they are only symbols in the hands of the holder, affording no presumption that he is the owner of the stock, but are consistent with an agency to act for the signer.

The rights of a *bona fide* holder, as against the true owner of the stock, to whom the apparent owner has either sold or pledged, do not depend on a negotiable character in the certificates, but rest on another principle ; "namely, that one who has conferred upon another by a written transfer all the *indicia* of ownership of property, is estopped to assert title to it as against a third person, who has in good faith purchased it for value from the apparent owner." As a general rule, the vendor or pledgor can convey no greater right or title than he has. Simply intrusting the possession of a chattel to another as a depositary, pledgee or other bailee, is insufficient to prevent the real owner reclaiming his property in case of an unauthorized disposition of it by the person so intrusted. The mere possession of chattels, without evidence of property or authority to sell from the owner, will not enable the possessor to give good title. But if the owner intrusts to another the possession of property, and also written evidence of title and power of disposition over it, as respects innocent third persons, he is deemed as intending it shall be disposed of at the pleasure of the depositary. If there be conditions on which this apparent right of control is to be exercised, not expressed on the face of the instrument, the case, in principle, is like that of

an agent who receives secret instructions qualifying or restricting an apparent absolute power. If the owner of the stock voluntarily give certificates with blank assignment and power to make transfers, to his brokers, who betray the confidence reposed in them, such owner must suffer the loss, rather than innocent strangers whose money the brokers were thereby enabled to obtain. The principle applies to pledges of stock, and one who purchases from the pledgee may hold against the pledgor. And if the pledgee pledge it to secure payment of his own debt, the second pledgee may hold it as security till his debt be paid. "A person loaning money on such certificate and power, has a right to believe that the borrower from whom he receives them has an absolute right to pledge the stock." By commercial usage, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. *Moore v. Metropolitan National Bank*, 55 N. Y. 41; *McNeil v. Tenth National Bank*, 46 Id. 325; *Pratt et al. v. Tilt et al.*, 28 N. J. Eq. 480; *Bridgeport Bank v. New York and New Hampshire Railroad Co.*, 30 Conn. 275; *Mount Holly Turnpike Co. v. Ferree*, 2 C. E. Green, 117.

The doctrine of these and kindred cases is not in the least shaken or qualified by the late decision in *Shaw et al. v. The Merchants' National Bank of St. Louis*, S. C. U. S., 37 Leg. Int. 135, where the distinction between negotiable paper and bills of lading is pointed out with great clearness. Between such paper and certificates of stock, the distinction may be as wide. Perhaps, under similar circumstances, a like rule would be applied to the holder of a stolen certificate as to the holder of a stolen bill of lading, but such is not this case. There the court say: "It may be that the true owner, by his negligence or carelessness, may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness.

But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right." The bill of lading having been stolen without fault in the owner, he was held entitled to recover against a purchaser who had reason to believe that his vendor was not the owner, but held it to secure the payment of an outstanding draft. Nothing in the case tends to show that if the owner had voluntarily given that bill of lading to another, he could have recovered against a purchaser for value who took it in good faith.

We are convinced that the master adopted the true principle applicable to the papers in question; he neither held that they were negotiable, nor that it was a mere matter of the actual agency or authority of MacDowell & Wilkins.

Do the same rules apply to these stocks as if they belonged to a living owner? An executor holds under a trust; he is the minister or dispenser of the goods of the dead. He has the same property in the personal effects as the deceased had when living. It is a general rule of law and equity, that an executor has an absolute power of disposal over the personal effects of his testator, and they cannot be followed by creditors nor legatees into the hands of the alienee. This results from the fact that in many instances the executor must sell in order to perform his duty in paying debts, &c.; and no one would deal with him if liable afterwards to be called to an account. Co-executors are regarded in law as an individual person; and the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all; as where one releases a debt or settles an account of a person with the deceased, or surrenders a term, or sells the goods and chattels of the estate, his act binds the others. An exception to this general power will be found in those cases only when collusion exists between the executor and purchaser. That the executor may waste the money is not alone sufficient to invalidate the sale; it must further appear that the purchaser participated in the *devastavit* or breach of duty in the executor. Thus, when the person to whom the executor passes the property, knows that the execo-

utor is acting in violation of his trust and in fraud of those interested in the due administration of the assets, the fraud vitiates the transaction, and the attempted transfer is void. These familiar elements, the base of the master's reasoning, are its sure support.

Were MacDowell & Wilkins defendants instead of their pledgees, the appellants' argument would be irresistible; for they participated in the wrongful act of George R. Wood. As executor, he could not make a valid sale or pledge of the stock as a security for or in payment of his own debt to them; the transaction itself gave them notice of the misapplication, and involved them as participants in the breach of duty. Where money was obtained on the security of stock belonging to an estate, the borrowers, sons of the testator, represented that they owned and had the right to pledge it, but the transfer was made by the executrix to the lenders, who gave her a receipt stating the purpose for which they held it, and that it was to be returned to the estate if their debt was paid, the transaction gave the lenders notice, and the trust was not divested. *Prall v. Hamil*, 28 N. J. Eq. 66.

An executor's duty is not like that of a trustee, in whom property is vested, not for administration or sale, but custody and management for his *cestuis que trust*. The party taking stock on pledge from such trustee deals with it at his peril, for there is no presumption of a right to sell it, as there is in the case of an executor. *Duncan v. Joudon*, 15 Wall. 165; *Shaw v. Spencer*, 100 Mass. 382.

"The executor has the right to sell and transfer, and one who buys of him in good faith, and pays in money the price agreed upon, is not responsible for the application of the purchase-money." Per Hunt, J., *Leitch et al. v. Wells et al.*, 48 N. Y. 585. Letters of administration are always sufficient evidence of authority to transfer, because a sale and transfer of stock is in the line of the duty of an administrator. The powers of an executor or administrator differ from those of an ordinary trustee; the duty of the latter being custody and management, of the former to dispose of the personal property, to pay debts, &c. Executors may use specific legacies to pay debts, if nec-

essary. *Bayard v. Farmers' and Mechanics' Bank*, 2 P. F. Smith, 282. The fact that the legal title to the stock was known to have previously been in the executor, and that the title of the holder appeared on its face to have been derived from him in his representative capacity, will not raise a suspicion, or put a purchaser on inquiry, for the reason that it is the executor's primary duty to dispose of the assets and settle the estate. *Prall v. Tilt, supra*. We think the master was right in holding "that the same principle which prevails in the case of an absolute owner applies in the case of an executor who invests the holder with apparent ownership."

The defendants had a right to infer that MacDowell & Wilkins were the owners of the stock, although the certificates showed title in Charles S. Wood, and the blank assignments and powers were signed by George R. Wood as acting executor. They found MacDowell & Wilkins clothed with apparent ownership. The testator had given George R. Wood the strongest expression of confidence in making him an executor of his will, thereby vesting absolute power in him to sell and transfer the stock in the line of his duty. He was acting executor. Neither his co-executors, nor others interested in the estate, had taken a step to prevent him from committing waste. The law casts no duty upon a purchaser to ascertain if the trusted executor of the decedent's will is mismanaging the estate in fraud of creditors or legatees. The defendants had no knowledge of the collusive transaction between the executor and MacDowell & Wilkins, nor reason to believe that they, the pledgors, were not the real owners, as they appeared. If it be that the perfidious conduct of the executor results in loss to innocent persons, either those interested in the estate or the pledgees of the stock, it must fall on those whose interest he betrayed.

Decree affirmed, at the cost of appellants, and appeal dismissed.

Justice PAXSON dissented.

As to power of an executor to pledge personal property of estate, see *Carter v. Manufacturers' Bank*, 1 Am. Prob. R. 198.

ALEXANDER vs. WALLACE.

[8 B. J. Lea, 569.]

DIRECTION TO DIVIDE REAL AND PERSONAL ESTATE ACCORDING
TO LAW.—POWER OF SALE.

A direction that the remainder of testator's estate, both real and personal, be divided "among my (his) heirs according to the laws of the State of Tennessee now in force, none preferred, none discriminated against," vests the realty in the heirs, as prescribed in the statute of descent, and the personalty in the next of kin, as specified in the statute of distributions.

An authority to an executor to take entire charge of the estate "without any bond or any liability," "relying on his integrity and judgment entirely," confers no power of sale or authority not ordinarily possessed by an executor as such.

APPEAL from the Chancery Court at Gallatin.

J. J. Turner, for complainant.

S. F. Wilson, for defendants.

COOPER, J. Bill filed by the executors of the last will and testament of James Wallace, deceased, against the heirs and distributees, who are also devisees and legatees, for a construction of the will. The testator died in October, 1881, about eighty-three years of age, without wife or child. He was the youngest of twelve children, and had survived all of his brothers and sisters, each of whom left children surviving. Many of these children died before the testator, leaving children, and some of these latter children also died before the testator, leaving children. The descendants of his brothers and sisters are the heirs and distributees of the testator. They are numerous, and reside in various States and territories. The testator owned at his death over nine hundred acres of land in this State, and about eighteen hundred and eighty acres in the State of Texas. He had a large personal estate. The will was written by one of the subscribing witnesses, a man of age, and of fine business capacity, a cashier of a bank for a number of

years, and in the habit of drawing up legal instruments, but not a lawyer.

The testator provides by his will for the payment of his debts and for certain old servants, who are named. His will then proceeds as follows:

"Fourth. I direct that the remainder of my estate, both real and personal, be divided among my heirs according to the laws of the State of Tennessee now in force, none preferred, none discriminated against.

"Fifth. I desire and direct that no portion of my estate shall be subject to any supervision of, or liability to any court whatever.

"Sixth. I hereby appoint my long tried and faithful friend, James Alexander, my executor, to take charge of my entire estate, and execute this, my last will and testament, and to do so without any bond, or any liability for errors and defects, either to my heirs or to any court, relying upon his integrity and judgment entirely."

It is conceded that the last provision in relation to the non-liability of the executor for any abuse of, or default in the trust conferred upon him, is contrary to public policy, and of no avail. And it must be admitted that the testator's direction that no portion of his estate shall be subject to the supervision of the courts, has proved an ignominious failure. The executor has himself come into court, and brought all parties interested in the estate with him. What portion of the estate will go to the officers of the court remains to be seen.

The impression made upon the mind by the language of the fourth clause of the will is, what the facts render probable, that the testator had no choice among the numerous and scattered descendants of his brothers and sisters, and was willing that they should take his property as the law would divide it. The words "according to the laws of the State of Tennessee," would, in this view, not only ascertain the persons to take, but determine the quantum of estate or interest each of those persons should receive. The testator, being himself indifferent, leaves all to the law.

The "heirs" of the testator, by the laws in force at his

death, to inherit the realty, were the issue of his deceased brothers and sisters, such issue in each descending line taking by way of representation of a deceased parent, and therefore *per stirpes*, without any limit to the representation. (Code, secs. 2420, 2421; *The Miller Wills*, 2 Lea, 54.) The distributees of the personal estate, by the same law, were the children of the brothers and sisters, to the exclusion of the remoter descendants, there being no representation among collaterals in the distribution of personalty after brothers' and sisters' children. (Code, secs. 2429, 2430; *Penniman v. Francisco*, 1 Heisk. 511.) And these children would take *per stirpes*. The result would be, if the testator's property be divided among his heirs and distributees according to the laws of the State in force at the testator's death, that the heirs would take the realty in the descending line, without limitation, by way of representation and *per stirpes*, and the distributees to take the personalty, would be the children of brothers and sisters to the exclusion of the remoter descendants.

In view of this inequality of benefit among the descendants of the same *stirpes*, able and exhaustive arguments have been presented in support of a different construction of the will. In the first place, it is contended that the word "heirs," as used in the fourth clause of the will, must be taken in its strict technical sense, as designating the objects of testator's bounty, and that the entire estate, real and personal, will go to the same persons. Like all other legal terms the word "heir" or "heirs," when unexplained and uncontrolled by the context, is usually interpreted according to its strict and technical import, in which sense it designates the person or persons appointed by law to succeed to the real estate in case of intestacy. (2 Jar. on Wills, 61, 5th Am. ed.) But an intention actually expressed, or to be gathered from the language used, will prevail over the technical meaning of the word. Where a mixed fund of realty and personalty is given to the heir, less difficulty has been found in treating the person answering the description as taking both funds. (*DeBeauvoir v. DeBeauvoir*, 3 H. L. Cas. 524, 558; *Gwynne v. Muddock*, 14 Ves. 488.) But, as said by the great judge, Sir William Grant, who deliv-

ered the opinion in the last of these cases, "it is always a question of intention what the testator means by the use of such description." And the state of the authorities is such that the vice-chancellor of England felt constrained to say in a comparatively recent case: "I cannot assent to such a proposition of law as that where real and personal estate are blended, the personality goes as the realty. Such a proposition is, I think, bad law, and authority is the other way." (*Herrick v. Franklin*, L. R. 6 Eq. 594.) In a still more recent case, where a direction to divide a sum of money "amongst the heirs of my late brother," was held to give the money to the next of kin of the brother according to the statute of distributions, another vice-chancellor said: "In the midst of the 'confusion worse confounded' which exists among the authorities on this subject, I must endeavor to put such a construction upon the language of this will as the general sense of the instrument requires." (*In re Stevens' Trusts*, L. R. 15 Eq. 110.)

In this State we have held that the word "heirs" is flexible, and may mean heir at law or next of kin, according to the nature of the property given, and the construction can be applied to a mixed devise *reddendo singula singulis*. (*Ward v. Saunders*, 3 Sneed, 337; *Ingram v. Smith*, 1 Head, 412, 426; *Gosling v. Caldwell*, 1 Lea, 454.) The weight of authority is in favor of the flexible character of the word. (*Gittings v. McDermott*, 2 M. & K. 69; *Vaux v. Henderson*, 1 J. & W. 388 n.; *Crown v. Henesey*, 4 Hawks. 392; *Ferguson v. Stewart*, 14 Ohio, 140; *Clark v. Lynch*, 46 Barb. 68; *Evans v. Godbold*, 6 Rich. Eq. 26; *Morton v. Barrett*, 22 Me. 257.)

It is next contended that the will provides for equal division among the heirs. If the testator has introduced into the gift expressions requiring an equality of distribution, the statutory mode is in general excluded, and the class of heirs or devisees designated take *per capita*. (*Puryear v. Edmondson*, 4 Heisk. 43; *Parrish v. Groomes*, 1 Tenn. Ch. 581; *Low v. Smith*, 25 L. J. Ch. 293.) But this, too, is controlled by the intention of the testator, and if that intention leaves it doubtful in what proportions the class is to take, and *a fortiori*, if it expresses or fairly implies the contrary, the rule of equality will not pre-

vail. (*Harris' Estate*, 74 Penn. St. 452.) And if it can be fairly gathered from the will that the testator intended that his property should go according to the statutes of descent and distribution, even the express use of the words "equally divided," or "share and share alike," will not change the result. (*Fielder v. Ashworth*, L. R. 20 Eq. 410; *Holloway v. Radcliffe*, 23 Beav. 163; *Booth v. Vicars*, 1 Coll. C. C. 6; *Flinn v. Jinkins*, 1 Coll. C. C. 365; *King v. Savage*, 121 Mass. 303.) In *Holloway v. Radcliffe*, *ut supra*, the division was to be, "equally amongst my legal personal representatives, in such and the like manner as if the same had been to be paid under the statute of distributions," and the same point was made as in the case now before us. "It is contended," says the Master of Rolls, "that the true reading is to refer to the statute to ascertain who are the persons to take under the description of 'legal representatives,' and nothing more, and thereby give effect to the words 'equally amongst.' It will be seen that though the testator gave this moiety equally between the persons so ascertained, still the statute of distribution is referred to, not only for the purpose of pointing out who are the persons to take, but also, for the purpose of pointing out the manner in which they are to take." In *Fielder v. Ashworth*, *ut supra*, the words of the will were: "to distribute the residue to my relatives, share and share alike, as the law directs." Says the vice-chancellor: "What does he mean by this? Does he mean that the relatives are to take share and share alike, or does he mean them to take as the law directs under the statute of distributions? I think that the intention of the testator was that, not having made up his mind how to divide his property, and probably not knowing exactly how it would go under the statute of distributions, he thought it better to leave it entirely to the law, having confidence that it would then be divided in the most proper manner. The only mode of effecting this object is to disregard the words 'share and share alike,' and order the property to be divided as the law directs—that is, according to the statute of distributions."

The obvious intention of the testator in the clause in the will now before us, was to refer to the laws of the State of

Tennessee now in force, not only for the purpose of pointing out the persons who are to take, but also for the purpose of pointing out the manner in which they are to take. The testator, not having made up his mind how to divide his property, and probably not knowing exactly how it would go under the statutes, thought it better to leave it entirely to the law. And he has not hampered his general intent by any such inconsistent and clearly expressed phrases as those existing in the two English cases cited. The only additional words used by him are: "None preferred, none discriminated against." Precisely what was meant by these words is doubtful. But probably the testator only intended to say, no matter where my heirs may be, nor who they are, let them take the share of my estate which the law gives them. At any rate, they are not directly inconsistent with the residue of the clause, and cannot control its plain meaning.

There is no ground in the language of the will for the contention of the executor that he is authorized to sell the land of the estate. There is no conveyance of the land to him, nor any authority given to him to sell. The general power conferred upon the executor by the sixth clause is only such as would belong to him as executor, to take charge of the estate and execute the will. Whatever may have been the intention of the testator, the actual language used does not admit of any other construction. There is not the slightest indication of an intent to convert the land into money to be distributed as such.

No question of advancement can be raised under this will. For, whether the heirs and next of kin take under this will, or by law, the interest being the same, the whole estate is disposed of, rendering equality impossible. The testator had made no advancements in his lifetime.

There is no error in the chancellor's decree, and it must be affirmed. The costs will be paid out of the estate, and the cause remanded.

RUSSELL vs. HARTT.

[87 New York, 19.]

APPLICATION FOR ADMINISTRATION BY ATTORNEY IN FACT OF
LEGATEE.—PROOF OF FOREIGN WILL BY COMMISSION.

An agent of a legatee appointed by power of attorney to ask for and receive letters of administration, is "a person interested in the estate" within the statute, and the surrogate has jurisdiction to award the letters asked for on such agent's petition.

Where a testator, not an inhabitant of this State, dies out of it, leaving assets, the surrogate of the county where the assets are has jurisdiction to take proof of the will, and may act, though the original will is in the possession of a court of another country, and cannot be produced before him.

In proceedings for the probate of such a will, the exhibition of the original document before commissioners appointed by the surrogate to take testimony in the foreign country is substantially a production of the same before such surrogate.

APPEAL from a judgment of the Supreme Court, General Term, affirming a decree of the surrogate of Ulster county, admitting to probate the will of John Russell, "late of Broompark, Denny Sterlingshire, Scotland, deceased," as a will of real and personal estate.

The will had been previously admitted to probate in Scotland, and was in the custody of the court there. It disposed of real estate situate in Ulster county, and of personal property in this State, as well as of real and personal property in Scotland. It was executed according to the laws of Scotland, and also according to the laws of this State. The evidence of the subscribing witnesses to the will was taken by commission issued by said surrogate to commissioners residing in Scotland, a copy of the will was annexed to the commission, and certified by the commissioners as a correct copy.

The further material facts pertinent to the questions discussed are stated in the opinion.

Charles A. Fowler, for appellant.

S. L. Stebbins, for respondents.

FINCH, J. The jurisdiction of the surrogate of Ulster county to take the proof of a will of real and personal estate, executed in Scotland by a citizen of this State temporarily resident in that country, in accordance both with the foreign law and with our own, upon the production of an exemplified copy of the will, the original remaining in the custody of the foreign tribunal, is questioned upon this appeal.

That jurisdiction is first assailed upon the ground of the insufficiency of the petition with which the proceedings for probate began. Janet Russell was a legatee and devisee, and named as executrix in the will of the testator. Her right to ask for its probate is not at all questioned, but that is claimed to be a personal right which could not be devolved upon a stranger to the estate, or, if so, was not in the present case formally and sufficiently acted upon. The legatee and executrix, by a power of attorney duly and properly executed, and which recited at large the circumstances rendering it necessary, appointed the respondent Hartt her agent and attorney, in her name, place and stead, to present the will or duly authenticated copies thereof to the proper surrogate for probate, and to have the same duly proven as a will of real and personal estate, and to ask for and receive letters of administration, and take possession of and administer upon the estate of the deceased. Hartt thereafter presented to the surrogate of Ulster county a petition setting forth the usual and necessary facts, and, in addition, detailing the peculiar circumstances of the case, and asking for the probate of the will and the issue to himself of letters of administration with the will annexed. This petition was accompanied on its production to the surrogate by the original letter of attorney. Upon these papers the surrogate acted, and issued the usual citations. It is now objected that under the power of attorney the respondent was only authorized to petition for probate "in the name" of the executrix, and that the petition actually presented was in his own name and not in that of his principal. The criticism has very little just force beyond its purely technical character, and touches rather the form than the substance of the proceeding. The petition and letter of attorney taken together substantially make Janet Russell the real

petitioner ; but if, by reason of the form adopted, some doubt should remain, it is sufficient to say further that the letter of attorney transferred to Hartt the right of the executrix to letters of administration, and that a person having such a right is, in our opinion, a person "interested in the estate" (3 R. S. [6th ed.] 65, § 52), and so has a right to ask by petition for the issue of the letters of administration to which he is entitled. The surrogate, therefore, properly acted upon the petition and had jurisdiction to entertain the proceeding.

During its progress, and while it was pending, Janette Ostrander, one of the contestants, died, leaving infant heirs. A supplementary petition, signed "James C. Hartt by S. L. Stebbins," was thereupon presented to the surrogate, setting forth such death of one of the parties and the names of the infant heirs. Citations were issued to such infants, and on their return a special guardian was appointed. It is now objected that Stebbins, who was merely counsel for Hartt, had no right to make the petition and the surrogate gained no jurisdiction over the infants. We are not able to see the necessity of a petition by Hartt or, indeed, of any petition to justify the surrogate in bringing in the infants. The officer had already acquired jurisdiction of the proceeding and of the parties who were entitled to be heard at its commencement. The statute provides that upon an application for the probate of a will, the surrogate shall "ascertain" whether any of the persons interested are minors, and if so, their names and places of residence, and if there be such, appoint a special guardian to take care of their interests. (Laws of 1837, chap. 460, § 6 ; 3 R. S. [5th ed.] 147, § 51.) While it is common to furnish the requisite information in the original petition, we know of no rule which compels the surrogate to "ascertain" it in that way alone. And when, after proceedings for probate actually begun, a minor becomes interested by reason of the death of one of the parties, and the surrogate "ascertains" that fact, his duty and right to bring in such minor and appoint for him a special guardian is equally plain. How the officer ascertains the fact and the necessity is not made material. The affidavit of an attorney or counsel in the case is quite sufficient to give the information and authorize the sur-

rogate to act. In a case before the surrogate of New York, the omission of a minor as a party to the proceeding was discovered, by the surrogate himself, after twelve years of litigation, and a special guardian appointed. (*Saltus' Estate*, 1 Tucker, 230.)

Passing these preliminary objections we reach the graver and more important claim that the surrogate had no jurisdiction to take proof of the will as a will of real estate, because it was in the possession of a court or tribunal of justice in another country, whence it could not be obtained. The dispute comes down to a single point. The appellant insists that prior to the act of 1830 (Chap. 320) there was no jurisdiction or authority lodged anywhere to take the proof of foreign wills, and for that reason, expressly so stated by the revisers, seven new sections were added conferring such power upon the chancellor. On behalf of the respondent it is said, that jurisdiction to take the proof of foreign wills was vested in the Surrogate's Court, but was so hampered and rendered ineffectual in cases where the witnesses could not be produced by the inability of that court to issue a commission as to make necessary and occasion the authority conferred upon the chancellor, that such jurisdiction in equity was concurrent with that of the Surrogate's Court and did not exclude it; and that the difficulty in the way of the latter court of its want of power to issue a commission was removed in 1837 (Chap. 460, § 77). In *Isham v. Gibbons* (1 Bradf. 69), the learned surrogate very satisfactorily demonstrates that jurisdiction has always been with the surrogate to take the proof of foreign wills, having been conferred by the general authority to take the proof of wills of non-inhabitants where assets have been left in or have come into his county (Act of 1787, 1 Greenl. 366; act of 1801, 1 R. L. 449), and that the practice has been uniform to issue letters testamentary or of administration on the production of an exemplification of the foreign decree of probate. The very learned opinion of Judge Daly in the case of *Brick's Estate* (15 Abb. Pr. 31), traces out and explains the early authority and jurisdiction of the surrogates' courts, with a patience and accuracy of research which leaves nothing to be added. It seems to us most probable that by the phrase "for-

eign wills" the revisers meant such wills as could only be proved abroad, because the witnesses resided abroad. (*Isham v. Gibbons, supra.*) In that sense the defect they pointed out existed. It could be remedied in two ways. One was to give the necessary probate jurisdiction to the courts of Chancery, which could issue a commission to examine the foreign witnesses; and the other was to arm the Surrogate's Court with authority to issue a commission. The revisers adopted the first method, but the legislature in 1837 added the second. It is said, however, and that appears to be the precise and ultimate point of the argument made by the learned counsel for the appellant, that except in the case provided for by chapter 384 of the Laws of 1840, no authority has ever been given to a surrogate to act on a will the original of which cannot be produced before him. We think the act of 1837 is broad enough to cover the case. It expressly authorizes the surrogate of each county to take proof of the last wills of *all* deceased persons where the testator, not being an inhabitant of this State, shall die out of the State leaving assets in the county of such surrogate (§ 1); and then restores the incidental powers of surrogates, and authorizes them to issue commissions to take testimony in foreign countries. And the right of the surrogate to admit a will to probate within this State, upon the production of an exemplification of the foreign record thereof, is distinctly recognized by chapter 403 of the act of 1863. But the point pressed upon us is also well answered by the suggestion of the learned surrogate who admitted the will to probate, that the commission issued by the surrogate made the commissioners officers of the court for the purposes for which it was issued; that in the execution of the authority conferred they stood in the place of and represented the court; and that the exhibition of the original will before them in Scotland was substantially a production of the will before the court. Certainly no really useful or beneficial purpose to be derived from such production was lost to the parties, when the commissioners appointed by the court were enabled to see and examine it, and to certify personally to the correctness of the copy returned.

The final point taken by the appellant is founded upon an

alleged fact which the surrogate has found against him, and we think correctly upon the evidence. The finding is expressly that the deceased was an inhabitant of Scotland at the time of his death, and not of this State.

The judgment of the General Term affirming the decree of the surrogate should be affirmed, with costs.

All concur.

Judgment affirmed.

Presentation of will by person interested. *Besançon v. Brownson*, 1 Am. Prob. R. 461,

GILBERT vs. WELSH.

[75 Indiana, 557.]

INVESTMENTS.—BANK STOCK NOT PROPER.

A direction in a will that a legacy be put at interest must be strictly followed.

In such a case bank stock is not a proper investment.

An investment of estate funds in securities in the name of the executor is improper.

From the Clark Circuit Court.

M. C. Hester, for appellants.

C. L. Jewett and *H. E. Jewett*, for appellee.

WOODS, J. The appellants, who are husband and wife, filed exceptions to the final settlement report of the appellee, as administrator, with the will annexed, of the estate of John Denny. Issues of fact were formed, and a trial had, which resulted in a finding and judgment for the appellee, confirming his report and discharging him from his trust as to the appel-

lant Agnes C. Gilbert. The only question presented here is, whether the finding is contrary to the law and the evidence. There is no conflict in the evidence, and it shows the following facts:

John Denny died testate, and by his will made a bequest to his daughter Agnes, which was not to be paid to her so long as she remained the wife of her then husband, but was to be put at interest by the executor, and the interest to be paid to her in person. The terms of the will, so far as necessary to be considered, may be found in the opinion delivered in *Gilbert v. Welsh*, 51 Ind. 491, in which case it was decided that, having been divorced from her said husband, she was entitled to receive the bequest into her own possession and control. Barnett, the executor named in the will, managed the trust until June, 1874, when he made to the court a report for final settlement, showing in his hands from said legacy, for the use of said Agnes, the sum of \$1,614 63, and an equal sum for her sister Eliza, and asking to be allowed to resign the trust. This report the court approved, and ordered him to pay said sums to his successor, when appointed. Thereupon the appellee was duly appointed the successor in said trust, for both said Agnes and Eliza; but, instead of taking from Barnett the said sums in money which Barnett was ready to pay, the appellee received the sum of \$79 26 in cash, and, for the remainder, took an assignment of thirty shares, of the par value of \$100 each, of the capital stock of the First National Bank of Jeffersonville, Indiana, at and for the price of \$105 for each share. The assignment was taken by the appellee in his own name, without any trust being expressed or indicated, but with the intention to hold the stock as an investment of said legacies; and this intention was known to the officers of the bank. The bank was at the time prudently managed, and was paying five per cent. semi-annual dividends upon its stock, which was then worth in the market and in fact \$105 per share. Before receiving the stock, the appellee made careful and proper inquiries concerning its value, and took it in good faith, believing it to be a good and safe investment. Thereafter the appellee paid to the said Agnes the dividends received upon said

stock, but for each sum so paid to her she gave a receipt describing it as "interest on my legacy," or "interest on my legacy of \$1,614 63," etc. In his receipt to his predecessor in the trust, the appellee had charged himself with that sum of money received on account of the legacy of said Agnes; the verified final statement of Barnett, with which said receipt was filed as voucher, showed the transfer of said sum in money; and there is in the evidence nothing which shows, or fairly tends to show, that the said Agnes knew or approved of the investment in said shares of stock. Soon after the investment was made, the bank suffered unexpected losses, equal to one-fourth of the value of the capital stock, and, in consequence thereof, the original shares were cancelled, and new stock issued to the amount of seventy-five per cent. of the old, making the new shares of par value, but resulting in a loss of nine hundred dollars of the sum invested by the appellee, of which, in his said final report, he has charged the one-half against said Agnes; and to this charge mainly the appellants address their exceptions. The new shares of stock were also issued to the appellee in his own name. The original purchase had been made by the appellee, without an order of court therefor, and the transaction had never been reported to the court or confirmed, before the confirmation of said final report, from which this appeal is prosecuted. The evidence also shows a settlement between the parties, which, according to the testimony of the appellee, the only witness who testified on the subject, was as follows: "About the 20th day of October, 1876, after the bank stock had been reduced, and while I supposed I had to bear the loss of the depreciation, Mr. Gilbert and I agreed that I should pay him, for his wife, eight hundred dollars in cash, and should transfer to them six hundred dollars of the new stock that had been issued to me, the stock to be taken at par value. I was to retain the right to receive whatever was made on the said stock from the suspended debts due the bank. In accordance with this agreement, I paid the eight hundred dollars and transferred the six hundred dollars of bank stock to Mr. Gilbert, and took the receipt of himself and wife for fourteen hundred dollars. It was agreed further between us, at

that time, that as soon as I should settle with the court, and find what more was due his wife, if anything, I should then pay such balance, if any. This agreement with Gilbert was made upon the supposition that I had to account for the sum of \$1,614 63, for which I had receipted to Barnett as so much money."

The appellants claim, upon these facts, that the loss on the bank shares is the individual loss of the appellee, because the investment was made without authority of the court, was made in his own name as an individual investment, and, if made in execution of the trust, it was in violation of the terms of the will, which required the legacy to be put at interest. On the other hand, the counsel for the appellee claim, on the authority of 1 Perry's Trusts, secs. 452, 460, that the direction to put at interest, means no more than a direction to make the fund productive, and that the appellee's duty was to make an investment, without waiting for an order of court therefor. They further argue that bank stock is a proper investment, and claim that it is so held in by far the greater number of the States of the Union, wherein the courts have passed upon the question. They cite *Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Pick. 116; *Clark v. Garfield*, 8 Allen, 427; *Smyth v. Burns*, 25 Miss. 422; *Brown v. Wright*, 39 Ga. 96; *Hammond v. Hammond*, 2 Bland's Ch. 306; *Gray v. Lynch*, 8 Gill. 403; *Murray v. Feinour*, 2 Md. Ch. 418.

There are several reasons why, in our judgment, the loss in question must be borne by the appellee. First, because, at the beginning of his trust, withholding the truth of the case from the court and the parties interested, he charged himself on the record with money not, in fact, received, and took the assignment of the stock in his own name. Further, that the facts stated, there is no ground for charging any bad faith, and it is to be presumed that none was intended; yet, by the course pursued, the appellee, in some measure, saved the opportunity of claiming for himself the benefit of any rise in the value of the shares, and, a loss having occurred, he should not be permitted to cast it upon the trust estate. The rule, which requires that trust funds be kept separate from individual mon-

eyes or investments, cannot be relaxed with safety. It is well settled, that, if a trustee deposit the trust fund in bank, in his own name, he will be charged with interest upon it, and, if a loss occur, through failure of the bank, or otherwise, he must suffer it. (1 Perry's Trusts, secs. 443, 444, 468, and cases cited.) It is true that, in *Richardson v. The State, ex rel.* 55 Ind. 381, it was held that the taking of notes by a guardian, in his own name, for moneys belonging to his ward, was not conclusive proof of a conversion. On this subject, see *The State, ex rel. v. Sanders*, 62 Ind. 562; *Lowry v. The State, ex rel.* 64 Ind. 421; *Tucker v. The State, ex rel.* 72 Ind. 242.

But the question before us is not a question of conversion, nor one to be determined by the same test. Whether a conversion of the trust money or property has occurred, depends somewhat upon the intention of the trustee in doing the act which is claimed to constitute the conversion, as well as upon the nature and consequences of the act, but the rule which holds the trustee personally responsible for losses incurred of money deposited or invested in his own name, rests, as we conceive, upon different considerations. By deposits and investments in his own name, the trustee obtains advantages by way of personal credit and otherwise, to which he is not justly entitled, and good policy, with a view to the faithful conduct of those who are made trustees, requires that they should, in such a case, take the risk of loss, and, that there should be no inquiry permitted into the good faith of such transactions, the secret springs of which, in most cases, it would probably be impossible to discover.

In the second place, the provision of the will, that the legacy should be put at interest, is equivalent to a direction that the fund be either loaned at interest, or invested in an interest-bearing security. The law is, that such directions in a last will or testament must be strictly followed. (1 Perry's Trusts, secs. 452, 460, 461.) It cannot be properly said that shares of capital stock in a bank are interest-bearing securities. Dividends, customarily at least, are declared at the will of a board of directors. They may be small or great, or, if emergencies require, may be omitted entirely. But interest is a matter of contract,

certain in amount and in the terms of payment, and always enforceable by the ample remedies of the law, if the loan or investment be prudently made.

In the third place, the evidence shows that the parties made, and in part executed, a settlement between themselves, on a basis inconsistent with the position now taken by the appellee. That settlement was made upon the understanding that the appellee was accountable for \$1,614 63 in money, and, upon that understanding, the appellants consented to accept of him, in part payment, \$600 of his new bank stock. That stock is not money, and may or may not be, or have been, worth the price at which it was taken; but, having accepted it of the appellee on the theory that he must account for the sum named, they have the right to have the account adjusted on that basis.

Exception is also made to some small items of costs paid by the appellee, but we do not find that any error has intervened in reference thereto.

A motion to dismiss the appeal in this case has been filed. In this respect, the facts are substantially the same as in *West v. Cavins*, 74 Ind. 265, and, in accordance with the decision made in that case, the motion must be overruled.

The judgment is reversed, with costs, and with instructions to grant a new trial.

Generally.—It is manifestly improper to take one and the same security for an individual and a representative debt. *Kirkman v. Benham*, 28 Ala. 501.

So a loaning of trust funds to the trustee on a note and mortgage is a *deusdedit* rendering him liable at the election of the *cestui que trust*. *De Jarnette v. De Jarnette*, 41 Ala. 708.

Directions by the court.—In New Hampshire, it is held that the court may give directions as to the investments to be chosen either by general rule or in the specific case. In *Wheeler v. Perry*, 18 N. H. 307, it was on a bill filed, which embraced also the construction of a will.

In *Burrill v. Sheil*, 2 Barb. 457, 469, the will directed certain funds to be invested in England, and the court held it had no power to divert the funds from that country without the consent of all parties interested, which was not obtainable where infants, not within the court's jurisdiction, were concerned.

In *Wood v. Wood*, 5 Paige, 596, 600, a like ruling was made as to the

necessity of consents, and it was said that the court could assent for infants within its jurisdiction.

In *Armory v. Green*, 18 Allen, 418, the testator directed the investment of a sum of money, for the benefit of his daughter, in a "dwelling-house, land, furniture and household goods." It was held that the investment might be made outside of the State.

A change in the character of the fund from a personalty to a realty investment can only be made by leave of the court. *Quick v. Fisher*, 4 Halst. Ch. 674, 778; s. c. 1 Stockt. 802; *Snowhill v. Snowhill*, 2 Gr. Ch. 20; *Manning v. Craig*, 3 Gr. Ch. 436; *Gamble v. Gibson*, 59 Mo. 585.

Railroad bonds.—In *King v. Talbot*, 40 N. Y., 76, the question was not necessary to a decision of the case, but Woodruff, J., at page 91, said: "If the real estate is ample to insure the payment of the bonds, I do not at present perceive that it is necessarily to be regarded as inferior to the bond of an individual secured by mortgage; it would of course be open to all the inquiries which prudence would suggest if the bond and mortgage were that of an individual."

In Massachusetts, such investments have been approved, even where the entire property of the railroad was without the State. *Brown v. French*, 126 Mass. 410.

In *Allen v. Gaillard*, 1 S. C. 279, the investment was made in railroad bonds bearing seven per cent. interest, which were a favorite investment with capitalists, and sold in the market at eighty-five cents on the dollar. The bonds were not secured by mortgage, and the court disapproved of the investment, holding that the value of the securities was "too unstable and speculative."

Government bonds.—In England the courts favored investments in such securities, and in this country they are now universally regarded as proper securities for purchase by executors and trustees.

Municipal bonds are not approved of in all instances. *Tucker v. Tucker*, 33 N. J. Eq. 235.

Personal security.—It is a rule well settled in the English Court of Chancery, that if an executor or administrator loans money of the estate upon mere personal security he shall be individually answerable for any loss which may accrue from defective security. 3 Williams' Ex. 1918; 1 Perry on Tr. § 458, and cases cited.

The same principle is of general acceptance in the courts of this country, and is sustained by the following authorities: *Gray v. Fox*, Saxton, 259; *Vreeland v. Vreeland*, 16 N. J. Eq. 512; *Moore v. Hamilton*, 4 Fla. 112; *Moore v. Felkel*, 7 Id. 4; *Wells v. Grigsby*, 42 Ala. 473; *Tomkies v. Reynolds*, 17 Id. 109; *Gerald v. Brinkley*, Id. 170; *State v. Johnson*, 7 Blackf. 529; *Nyce's Estate*, 5 Watts. & S. 254; *Smith v. Smith*, 4 Johns. Ch. 281; *Lacey v. Davis*, 4 Redf. 402; *King v. Talbot*, 40 N. Y. 76; *Bohde v. Bruner*, 2 Redf. 332.

In the case last cited, the loan was made upon a promissory note at less than the full rate of interest allowed by law, and the executor was charged

with the highest rate permitted, although it did not appear that any loss had occurred.

In *Brown v. Wright*, 39 Ga. 96, it is said that the English rule was never adopted in that State in all its stringency, and a loan of \$1,440 on a note secured by mortgage on slaves worth \$3,000 was approved.

In *Knowlton v. Brady*, 17 N. H., 458, the court declare that there is no absolute prohibition against such loans in all cases, "but generally security should be obtained for any but small sums by mortgage or deposit in a savings bank, or by a surety upon a note."

The Massachusetts rule is thus stated in *Harvard College v. Amory*, 9 Pick. 461: "All that can be required in such cases is that the trustee shall conduct himself faithfully and exercise sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested."

Under this rule the court, in *Lowell v. Minot*, 20 Pick. 116, sustained a loan on a promissory note, due in one year, secured by a pledge of stock in a manufacturing corporation. But, in *Clark v. Garfield*, 8 Allen, 427, a loan solely upon the note of an individual engaged in active business was disapproved of unless "under extraordinary circumstances."

The general rule was approved in *Kinmouth v. Brigham*, 5 Allen, 270, and *Brown v. French*, 125 Mass. 410, and in the last case it is said that recourse must be had to the legislature for a more strict or precise rule.

The rule in South Carolina holds trustees responsible on losses upon loans to private persons, unless collateral security is taken with the loan. Such security should primarily consist of mortgage of unincumbered real estate,—personal securities solely are not in themselves admissible, and can only be made so by evidence of the necessity and prudence of such investment. *Nance v. Nance*, 1 S. C. 209; reviewing the earlier cases of *Spear v. Spear*, 9 Rich. Eq. 184; and *Mulligan v. Wallace*, 3 Rich. Eq. 111; *Allen v. Gaillard*, 1 S. C. 279; *Cureton v. Wilson*, 3 Id. 451; *Singleton v. Loundes*, 9 Id. 465.

Assessments on stock.—In *Estate Snow*, *Meyrick's Prob.* 97, it is said that if the executor pays the assessment he takes the risk that the stock will reimburse the estate, and if he fails to pay it he assumes the responsibility of its being worth more than the assessment, and it is suggested, as the wisest course, "to place the stock in the market, and sell it as perishable."

In *Lucich v. Medin*, 3 Nev. 98–109, and *Estate of Millenovich*, 5 Id., 163–187, the primary duty of the executor is said to be to sell stocks liable to assessments. He might, however, pay an assessment where there was a liability of forfeiture accruing before he could apply to the court for an order of sale.

In *Ripley v. Sampson*, 10 Pick. 371–373, it is said that the executor will be protected even where the shares fall in value in his hands after their redemption, if he acted prudently and in good faith.

Stocks.—The English courts disapproved of investments in stocks of pri-

vate corporations as being entirely dependent on the ability and fidelity of the individuals composing the board of direction. Special statutes were passed in 22 & 23 and 23 & 24 Victoria, to authorize such investments within certain limitations. 3 Wms. Exrs. 1916.

In *Hammond v. Hammond*, 2 Bland, 412, the chancellor held that the English rule had not been extended to Maryland, and enumerated "good bank stock" among the proper subjects for investment. A similar ruling was made in *Gray v. Lynch*, 8 Gill, 403, where the will required a disposition of the funds "in some safe and profitable stock," and they were put in shares of the United States Bank shortly before its dissolution.

In *Harvard College v. Amory*, 9 Pick. 446, a bequest of funds to executors, "to loan the same upon ample and sufficient security, or to invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment," was held to authorize loans on stocks of incorporated manufacturing and insurance companies.

In New York, the English rule is followed, and such investments are not approved. *Ackerman v. Emott*, 4 Barb. 626; *McRea v. McRea*, 3 Bradf. 199; *King v. Talbot*, 40 N. Y. 76.

In *Gillespie v. Brooks*, 2 Redf. 349, it was held to be the duty of the executor to sell bank and insurance stocks, left by the testator, within a reasonable time after the latter's death.

Where deceased died, the owner of shares in a steamship company, which after his death increased its capital stock, giving stockholders the right to subscribe at par for the increase, it was held that an executor had no right to invest estate funds in such increase. *Lacey v. Davis*, 4 Redf. 402, 405.

In *Smith v. Smith*, 7 J. J. Marsh. 238, the court refused to sanction a purchase of stock of the Bank of Kentucky.

In *Kimball v. Reding*, 31 N. H. 352, 374, the court, without stating any general rule, disapproved of the purchase of stock in an unfinished railroad.

This case was cited and followed in *Pray's App.* 34 Penn. St. 100, where, without passing on the propriety of an investment in the stock of a manufacturing company, the court held improper the purchase of such stock where the company's works were not finished, and its capital not fully paid in.

The weight of authority in Pennsylvania is in favor of the English rule, which was applied in *Nyce's Est.* 5 Watts. & S. 254; *Luken's App.* 7 Id. 48; *Morris v. Wallace*, 3 Barr. 319; *Hemphill's App.* 18 Penn. St. 303; *Worrell's App.* 23 Id. 44.

In *Twaddell's App.* 5 Barr. 15, an investment was upheld in loans of the Lehigh Navigation Company, a corporation stated to own landed capital and works of great value, the income from which was pledged to pay the interest on such loans in the first instance. In *Pray's App.* 34 Penn. St. 100, this case is said to be shaken, if not overruled, by *Hemphill's App.* and *Worrell's App. supra*.

In *Pleasant's App.* 77 Pa. St. 356, 359, there was a direction in the will to invest "in some safe and productive stock, mortgage or other real security,"

and a purchase of bank stock at a time when it was considered a good investment was upheld.

In *Smyth v. Burns*, 25 Miss. 422, an investment in bank stock at the time considered a safe investment was sustained.

In *Monk v. Pinckney*, 9 Rich. Eq. 297, the court ordered an executor to invest moneys in his hands in stock of the Bank of Charleston, but such a direction would hardly now be given, and without it an investment would be disapproved of by the court. *Nance v. Nance*, 1 S. C. 209; *Allen v. Gail*, lard, 1 Id. 279; *Womack v. Austin*, 1 Id. 421.

The New Jersey courts seem to follow the English rule. *Halstead v. Meeker*, 18 N. J. Eq. 186-140; *Ward v. Kitchen*, 80 Id. 81; s. c. 1 Am. Prob. R. 855; *Stephens v. Milnor*, 24 Id. 858.

In *Bowker v. Price*, 180 Mass. 262, stock held by an executor depreciated, after it had fallen somewhat, the *cestui que trust* demanded its sale, which was refused, it was subsequently disposed of at lower rates, but the action of the executor was upheld, the court saying, "All that was required of the trustee was that he should act with and in the exercise of a sound discretion." A similar ruling was made in *Gray v. Lynch*, 8 Gill, 408. In *McRea v. McRea*, 8 Bradf. 199, it is said that mere proof of a decline in market value is not enough to charge an executor; he must be shown to have acted unreasonably and unjustifiably in refusing to sell the stock. See, also, *Stephens v. Milnor*, 24 N. J. Eq. 858.

Continuing testator's investments.—The authorities are not uniform upon the question whether an executor may, without any responsibility, continue investments made by the testator in securities not recognized by law as proper for purchase by trust funds.

The Massachusetts courts lean towards an exemption of the trustee from liability. *Harvard College v. Amory*, 9 Pick. 446; *Pierce v. Bowker*, 180 Mass. 262. A dictum to the same effect is to be found in *Lacy v. Stamper*, 27 Gratt. 42-50.

Murray v. Feinour, 2 Md. Ch. 418, sometimes cited to the same effect, turned on the fact that there was a specific devise of stock in trust, and no change of investment could be made without the intervention of the court, in the absence of authority in the trust instrument.

Brown v. Campbell, Hopkins, 238; *Smith v. Smith*, 4 Johns. Ch. 281; and *Hogan v. De Peyster*, 20 Barb. 100, are also cited to sustain the same rule. The latter case contains remarks of the court favoring freedom from liability on the part of the trustee or executor, but the two former cases, as explained in *Ackerman v. Emott*, 4 Barb. 626-647, cannot be regarded as decisions in favor of the trustee. However these cases may be regarded, the later decisions treat the retention of an unauthorized security as equivalent to an original investment by the executor after the lapse of a reasonable time in which to dispose of the same. *Lacey v. Davis*, 4 Redf. 402; *Gillespie v. Brooks*, 2 Id. 849.

The South Carolina courts seem to adopt the same rule. *Spear v. Spear*, 9 Richard. Eq. 184, 201.

So far as the subject has been considered in New Jersey, the courts have followed the conclusions of the later New York authorities. *Ashhurst v. Potter*, 29 N. J. Eq. 625, 632; *Ward v. Kitchen*, 80 Id. 81-85.

Directions in will.—It is the duty of the executor to follow the clearly expressed intention of the testator in his will, and any departure from its directions is at his peril, so long as they are practicable. If the directions of the will cannot be carried out in this regard, the executor should dispose of the funds in such other securities as the court has approved. *Lansing v. Lansing*, 45 Barb. 182; *King v. Talbot*, 40 N. Y. 76; *Womack v. Austin*, 1 S. C. 421; *Sanders v. Rogers*, Id. 452; *Bannister v. McKenzie*, 6 Mumf. 447.

Where the courts, by their rules or decisions, have selected specified securities as proper for purchase by executors, the language of the will must be very explicit to enlarge the discretion of the representative of the estate and to permit him to go outside of such approved subjects for investment.

The following phrases have been held not to enlarge the executor's discretion:

"To invest in productive funds upon good security." *Ward v. Kitchen*, 80 N. J. Eq. 81; s. c. 1 Am. Prob. R. 355.

"In bonds and mortgages or in productive stocks." *Ashhurst v. Potter*, 29 N. J. Eq. 625.

"On good security." *Hammond v. Hammond*, 8 Gill, 408.

"To be invested and improved according to his best skill and judgment." *Kimball v. Reding*, 81 N. H. 352.

To put a sum "on interest to be well secured." *Nyce's Est. 5 Watts & S. 254.*

In the following instances the courts passed on peculiar directions in wills:

To invest in "productive real estate" will not authorize the purchase of lots and the erection of buildings thereon. *Holcombe v. Coryell*, 2 Stockt. 892. Nor will such language justify the purchase of land good for nothing but to supply soil used in brick-making. *Holcomb v. Holcomb*, 3 Stockt. 281-290; s. c. Id. 476. Nor will a direction "to invest on good bond and mortgage, or upon other good and sufficient security," authorize a purchase of real estate. *Baker v. Disbrow*, 18 Hun, 29.

"To invest in productive real estate, stocks or securities," will not warrant a purchase of machinery to enable the *cestui que trust* to carry on a manufacturing business. *Ryder v. Sisson*, 7 R. I. 341.

A loan on demand on personal security is not authorized under a direction to invest "in bank or other stocks, mortgages or other good security." *Barney v. Saunders*, 16 How. U. S. 535-545.

Where the direction to the executors was to use their own judgment as to investing moneys arising from the estate, coupled with a direction to keep at least one-half of such funds on mortgage, the court sustained a purchase of railroad bonds prudently made. *Brown v. French*, 125 Mass. 410.

In *McCall v. Peachy*, 3 Munf. 288, the testator's direction was to place his money "out at interest, upon good and sufficient securities, in Virginia or Maryland, as his executors should think proper." The purchase of loan of-

fice certificates was sustained, the court apparently deeming them in the nature of real estate securities within its rules.

A direction to put money at interest for a specified length of time gives a discretion to loan for less than the entire period named. *Miller v. Proctor*, 20 Ohio St. 442.

Mortgages.—Loans on bonds of individuals, secured by mortgages on real estate of adequate value, are generally approved of. *Lathrop v. Smalley*, 28 N. J. Eq. 192; *Gray v. Fox, Saxton*, 259; *Perrine v. Vreeland*, 38 N. J. Eq. 102; *King v. Talbot*, 40 N. Y. 76; *Knowlton v. Brady*, 17 N. H. 458; *Nance v. Nance*, 1 S. C. 209.

It is the duty of the executor to use ordinary care to see that the title to the property is valid, and that the value of the real estate at the time of the loan is an adequate security for the repayment of principal and interest. "The criterion of value in such cases is the opinion or estimate of men of ordinary prudence, who would deem it safe to make a loan of the like amount of their own money on the same property. Such men have adopted as a rule (as the evidence in this case shows—and it is the only safe practical rule), not to lend more than from one-half to two-thirds of the value of the property mortgaged." *Bogart v. Van Velsor*, 4 Edw. Ch. 718.

In this case the court disapproved of a loan of \$800 subsequent to one of \$1,800 on property sold for \$2,800.

A similar rule is stated in *Wilson v. Staats*, 38 N. J. Eq. 524-531.

In *Higgins v. Whitson*, 20 Barb. 141, executors loaned \$4,000 on a mortgage second to one for \$6,000, on property worth at the time \$16,000, and they were protected, the court stating that the mere circumstance that the security was a second mortgage is "no proof of neglect or mismanagement."

Executors and administrators are bound to familiarize themselves with the value of the proposed security by proper inquiries, but the exercise of their personal discretion is required, and they cannot leave the matter wholly to the judgment of others and be free from blame. *Savage v. Gould*, 60 How. Pr. 217.

In *Garesche v. Priest*, 9 Mo. App. 270, the court disapproved of the purchase of bonds of a church, secured on its real estate by a trust deed, with power of sale animadverting upon the character of the property as practically unsalable.

Statutes.—Provisions are to be found in the statutes of very many States regulating the manner in which investments shall be made by executors and administrators, and defining what are proper securities. It is not within the limits of this note to cite all such acts. A few only are chosen which have been the subject of judicial construction.

A New Jersey statute of June 13, 1820, provided that executors and others "may, by leave and direction of the Orphans Court, put out their minors' money to interest on such security, and for such a length of time, as the court shall allow of."

This language was held to require investments to be first submitted to

and approved by the court, and a decree confirming a loan previously made was unauthorized, and no protection to the executor or person making the loan. *Gray v. Fox*, Saxt. 271; *Shepherd v. Newkirk*, 1 Zab. 302.

By the Revision of 1878, title "Orphans Court," § 115, this language is changed to make it the duty of executors and others to apply for such directions, and when application is so made "they are absolved from loss, which otherwise must fall on them."

Under chapter 815, Maryland Laws of 1881, transcribed in sect. 10, art. 50, Rev. Code of 1878, providing that the Orphans Court "may order" administrators and others to deposit in bank, or invest in certain securities, funds under their control, it is held that an investment without the sanction of the court is wholly at the risk of the person making it. *Sullivan v. Howard*, 30 Md. 191.

Such approval cannot be by parol, but must be order entered and made matter of record in the court. *Carlyale v. Carlyale*, 10 Md. 440.

It would seem from *O'Hara v. Shepherd*, 8 Md. Ch. 306-315, that the subsequent recognition and approval of the court is equivalent to a previous direction.

In Pennsylvania, by Act March 29, 1832, Brightly, 423, it was provided that an executor "may" petition the Orphans Court, "whereupon it shall be lawful for the court" to direct the investment in specified public funds or real securities, and by following such direction the personal representative was protected from all loss.

This has been construed as not restricting executors and others to the securities designated in the act, and requiring the direction of the court in all cases, but as pointing out a course free from risk, leaving it to one following any other rule to justify his actions as best he can. *Twaddell's App.* 5 Barr. 17; *Nyce's App.* 5 W. & S. 254; *Worrell's App.* 9 Barr. 503.

The securities named in the act of 1831 have been largely increased in number of late years. *Brightly's Purdon's Dig.* 424; supplement, 1779-3003.

As to a somewhat similar provision in Georgia Statutes. *Brown v. Wright*, 39 Ga. 96.

DYE vs. YOUNG.

[55 Iowa, 483.]

DECLARATIONS OF TESTATOR AND LEGATEE TO PROVE UNDUE
INFLUENCE.

On an issue of undue influence, sustained in part by proof of inequality of bequests, statements of testator, made long before the execution of his will, that he intended to discriminate in the manner he has done, are admissible. Declarations of a legatee are not admissible to impeach a will where all the legatees are not joined.

CONTEST by Mary A. Logan and Lucinda D. Young, children, and Warren H. Smith, a grandchild of Joseph Dye, deceased, of the latter's will, on the ground of undue influence and want of sound mind and memory.

The questions were submitted to a jury, who found a special verdict negating undue influence and finding due execution and the possession of testamentary powers by decedent.

J. B. Young, for contestants.

J. C. Davis, for proponents.

DAY, J. Joseph Dye, at the time of his death, was seventy-one years old. The will was executed on the day before he died, when he was physically very weak and suffering great pain from his disease, which was an affection of the lungs. The will bequeaths the home farm, consisting of two hundred acres, to Miranda Dye, his second wife, and to his two sons, Frank and Charles, who are minors. It gives to his two married daughters, Lucinda Young and Mary Logan, \$400 each; to Cynthia G. Logan, \$200; to George and Harlan Smith, and the heirs-at-law of William Dickens, his grandchildren, \$100 each. Against the objection to contestants, one E. P. Taylor was permitted to testify to a conversation which he had with Joseph Dye about eighteen months before his death, as follows: "I am getting to be an old man, and I have never made any disposition of my property yet. I mean to do it soon. I want to

provide liberally for my wife and two younger children, as I have done something for the older children; I want to do something more than make matters even. My two younger children are weakly." The witness was also permitted to testify to a conversation, substantially the same, with Joseph Dye, about twelve months before he died.

One Aaron Taylor, Joseph Dye's hired hand, was permitted, against the objection of contestants, to testify as follows: "I heard him talk about the matter at different times. He told me he intended to have his will made in time, or there would be no peace after his death. He said he did not calculate to give the older children so much as the rest; he had helped them some time ago." The admission of this evidence is assigned as error. Under the circumstances we think it was not improperly admitted. One of the objections to the probate of the will is that it was procured by undue influence of interested parties. The inequality in the bequests is a circumstance which would, probably, in the minds of the jury, bear upon this question. The fact that the testator when in health, and long before the will was executed, and when he was not probably under the influence of other persons, expressed an intention to discriminate in the manner he has done, tends to remove any presumption which might arise against the validity of the will, from the fact of such discrimination. In *Stevens v. Van Cleave*, 4 Washington's C. C., 265, cited by the appellant, the plaintiff's counsel disclaimed any intention of imputing fraud to the defendant. This was a controlling point in the case. The other authorities cited are distinguishable from the case at bar.

It is next objected that the court erred in permitting the alleged will to be read as evidence to the jury. There is no assignment of error covering this objection, and it, therefore, cannot be considered.

The contestants sought to prove a declaration of Mrs. Miranda Dye on the morning after the will was executed, as follows: "His mind is wandering. It has wandered a great deal during his sickness." The testimony was rejected. The appellants insist it was proper evidence, because it is the admis-

sion of a party, and for the reason that it would contradict her testimony on that point.

A declaration of Mrs. Dye after the execution of the will is not admissible to impeach it. There are several legatees who do not contest the will, and who are not parties to this proceeding. Under such circumstances a declaration of one legatee is not admissible to impeach the will. *In Matter of Will of Mary Ames*, 51 Iowa, 596.

The testimony was not admissible to impeach Mrs. Dye. Her attention was not directed to the time, place and circumstances of the declaration offered.

The point mainly relied upon is that the verdict is not supported by the testimony. The two attesting witnesses, and three other persons who were present when the will was made, all testify that Joseph Dye's mind was clear, and that he seemed fully to comprehend what he was doing. One of these witnesses testifies to all the circumstances in great detail, showing that the testator, whilst physically weak and in great pain, was fully possessed of his mental faculties. The opposing testimony is mainly of experts based upon hypothetical questions framed from the testimony of the contestants and other interested witnesses as to his condition on the day of his death, the day after the will was executed. We think that the testimony not only warrants the verdict, but that it is supported by the clear preponderance of the testimony.

The proponents, as an amended abstract, have printed entire the reporter's notes of the evidence with question and answer, and remarks of court and counsel, embracing one hundred and thirty-six pages. It was altogether unnecessary; it entails upon us additional labor, and upon the parties additional expense. The contestants move that the costs of this amended abstract be taxed to proponents. We order that this be done.

Affirmed.

See will of Ames, 1 Am. Prob. R. 85, and cases in note; Canada's Appeal, Id. 1; Mooney v. Olsen, Id. 65; Hayes v. Burkam, Id. 179; Milton v. Hunter, Id. 521; Nelson v. McClanahan, Id. 411.

HOYT vs. HOYT.

[85 New York, 142.]

WHEN LEGACIES CHARGEABLE ON LAND.—EXTRINSIC CIRCUMSTANCES IN AID OF WILL.

Legacies may be charged upon real estate without express direction, if the intention of the testator so to do can be fairly gathered from all the provisions of the will; and extraneous circumstances may be considered in aid of the terms of the will.

Testator, after directing payment of his debts, and making specific legacies to grandchildren, payable at their majority, gave the "rest, residue and remainder" of his real and personal estate to his wife for life, and after her death part of the real estate to a daughter for life, and part of the personalty absolutely, and the "rest, residue and remainder" of his estate to four of his children. Six years later he made a codicil giving his widow power to sell the real estate subject to the approval of his heirs. At the time of making the will his personalty was sufficient to pay debts and specific legacies, but it was insufficient when the codicil was made. *Held*, that it was the intention of the testator that the legacies should be paid at all events, and the real estate was liable for such payment.

APPEAL from the General Term of the Supreme Court, affirming a judgment in plaintiff's favor at Special Term.

This action was brought by plaintiffs as legatees under the will of their grandfather, Belding Hoyt, among other things to have the legacies charged upon the real estate of which the testator died seized. The will was executed August 6th, 1868. The clauses of it in question are as follows:

"*First*. I order and direct that all my just debts be paid.

"*Second*. I give and devise to my grandchildren Jerome Hoyt, Montraville Hoyt and Peter Van Schruyver Hoyt, children of my son William, the sum of one thousand five hundred dollars each, to be paid to them upon arriving at the age of twenty-one years respectively.

"In case of the death of any or either of my said grandchildren Jerome, Montraville or Peter Van Schruyver before having received the said sum of money, then the said portion or portions shall be divided equally among my children Noah B., Anson B., George W. and Emeline Adelia, share and share alike.

“Third. I give and devise all the rest, residue and remainder of my real and personal estate to my beloved wife Rebecca, to be used and enjoyed by her during the term of her natural life, and from and immediately after her decease, I give and devise the same as follows: to my daughter Emeline Adelia the homestead property, * * * to be used and enjoyed by her during the term of her natural life, and from and immediately after her decease to be divided equally among my children Anson B. Hoyt, Noah B. Hoyt and George W. Hoyt, share and share alike; and also I give and bequeath to my said daughter Emeline Adelia all of my household furniture, and the rest, residue and remainder of my real and personal estate shall be divided equally among my children Anson B. Hoyt, Noah B. Hoyt, George W. Hoyt and Emeline Adelia Hoyt, share and share alike.

“In case of the death of any or either of my said children Anson B., Noah B., George W. or Emeline Adelia, before having received the property to which by the provisions of this will they would have been entitled, without leaving issue him, her or them surviving, then the said portion or portions shall be divided equally among the survivors of him, her or them, share and share alike. And if any or either of my said children should die as aforesaid, leaving lawful issue him, her or them surviving, then the children of him, her or them shall be entitled to receive the parent's share, and the same shall be divided equally among them.”

On June 11, 1874, just prior to the death of the testator, he executed a codicil, the body of which is as follows:

“Whereas, I, Belding Hoyt, of the city (formerly town) of Yonkers, county of Westchester, and State of New York, have made my last will and testament, bearing date the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-eight: Now, therefore, I do, by this my writing, which I hereby declare to be a codicil to my said last will and testament, and to be taken as a part thereof, order and declare that my will is: that my said wife Rebecca may at any time during her lifetime, sell and dispose of any or all of my real estate, giving and granting unto my said wife full power and

authority to execute and deliver to the purchaser or purchasers thereof the proper instruments in writing for the conveyance of the same in law; provided, nevertheless, and upon the express condition that such sale or sales shall be subject to the approval of each and every of the heirs of my said estate surviving at the time of such sale or sales as aforesaid."

The further material facts appear in the opinion.

R. W. Van Pelt, for appellants.

S. P. Nash, for respondents.

FOLGER, Ch. J. This is a suit seeking a judgment that the legacies given by the second clause of the will of Belding Hoyt are a charge upon the real estate devised thereby. It is but to utter common knowledge, to say that legacies of money are to be paid from personal property, and that, if the personal estate is insufficient therefor, the legacies are to abate, unless the real estate is charged with the payment of them. There is no express direction in this will that these legacies be charged upon the real estate. Yet legacies may be charged upon real estate without express direction in the will, if the intention of the testator so to do can be fairly gathered from all the provisions of the will; and extraneous circumstances may be considered in aid of the terms of the will. The will in this case is lean of the clauses and expressions that have been mainly rested upon in the earlier adjudications of the State as showing that intention. It does not direct the legacies to "be first paid," and then devise the real estate; it does not devise the real estate, nor the remainder of the real and personal estate, "after the payment of the legacies;" it does not devise the real estate to a person in his own right, or as executor, and expressly direct him to pay the legacies. It does not make a residuary devise of "all not herein otherwise disposed of." These several forms of expression have been held to indicate an intention in the testator to charge the payment of the legacies upon the real estate devised. None of them are here. Nor are there some things here that have been held, when present, to exclude the

inference of an intention to charge legacies. It is conceded that the debts of the testator were but nominal; so the provision for the payment of debts would not have raised in his mind the idea of a rest and residue of his estate after somewhat had been taken therefrom to satisfy them. There was no prior devise of specific real estate; so that it being taken away there would be left a rest and residue of that kind of property for the devise of the residue to apply to. There is no distinction in the gift of the rest and residue, between real and personal, but all the rest and residue of both kinds is given as one in the first disposition of it. There is nothing in the natural relations of the particular legatees to the testator and to the other legatees and devisees that would indicate less desire on his part that the former should be as sure as the latter of enjoying the bounty to them. None are strangers in blood. All could claim kindred there and have their claim allowed. There are but three things in this will that have any kin to what has been held to show that intention.

First. It is assumed that no man, in making a final disposition of his estate, will make a legacy, save with the honest, sober-minded intention that it shall be paid. Hence, when from the provisions of a will prior to the gift of legacies it is seen that the testator must have known that he had already so far disposed of his personal estate as that there would not be enough left to pay the legacies, it is reasoned that the bare fact of giving a legacy indicates an intention that it shall be met from real estate. So it was reasoned in *Goddard v. Pomeroy* (36 Barb. 546-56). Courts have been urged to go a step further, and to say, that when the facts of the estate, *aliunde* the will, show that the testator must have known that if a legacy was to be paid only from personal estate, it would be a barren gift, he must have intended to subject the real estate to a liability for it. Were the legacies here to strangers in blood, it would need a strong case, showing beyond doubt, that the testator was aware when he made the bequests that his personal estate would fail to satisfy the gifts made by him, to warrant the judicial inference of an intention to put a charge therefor upon real estate. We were so urged in *Bevan v. Cooper* (72

N. Y. 317, 322), but could not yield to it. In the case in hand, the will was made in 1868, and gave \$4,500 in legacies. At that time, it is inferable from the case that the testator had \$9,000 in money or choses in action. He had that sum at the time of his death in a mortgage on real estate of a son. It is also inferable that, at the time of making of the will, that mortgage would have been by business men esteemed collectible. Thus one of the facts was not in the case when the will was made, needful to construct the proposition we are considering. When the codicil was made, six years after the will, and on the eve of the decease of the testator, it is probable that values of real estate had shrunk so much that the mortgage was worthless; as it proved to be not long after, when a prior mortgage was foreclosed, and the testator's mortgage was left unpaid, and worthless; and his personal estate at his decease, except his household stuff, was not over \$200 in value. Now the codicil is in terms declared to be a part of the will, and the will is thereby in effect republished, and is thus republished in that changed state of the testator's pecuniary affairs. It is not directly shown that the testator knew of the worthlessness of that mortgage and the poverty of his personal estate when he made the codicil. But it is inferable, from the contents of the codicil and the circumstances about the testator at that time. Not a strong circumstance at best; it is too uncertain, considered alone, to give reasonable ground for inferring that the testator meant that the legacies should be charged upon the real estate. But there is an aspect of this matter that will properly be presented here, and which makes more significant the lack of assets. It is sometimes held, that where the only provision for a younger child is a legacy, that fact is of great weight, in determining that it was the testator's intent to make it payable at all events, and so out of the realty if the personalty is not enough. (Roper on Legacies, chap. 12, § 2, p. 454, subd. 2.) And the case of a grandchild is the same. (*Van Winkle v. Van Houten* 2 Green's Ch. [N. J.] 187.) The distinction is between a legacy to a stranger, which is a mere bounty, and a legacy that is the only provision for one of the blood of the testator who has a claim to recognition and provision. (See *Uvedale v.*

Halfpenny, 2 P. Wms. 153.) In such case courts go a great way in order to carry out the provisions of a will, founding the intention to make all parts of the estate liable upon the presumption of the strong desire and purpose that must have existed, that one natural object of testamentary bounty should not receive and another go away empty. In one case it is said that this fact alone is enough to turn the scale, where the provisions of the will are otherwise dubious. (*Moore v. Beckwith*, *infra*.)

Second. It is a rule in England, that if legacies are given generally, and the residue of the real and personal estate is afterward given in one mass, the legacies are a charge on the residuary real as well as the personal estate (*Greville v. Browne*, 7 H. of L. Cas. 689, in 1859, where it is said by Lord Campbell to have been a well-settled and useful rule of property for a century and a half; *Wheeler v. Howell*, 3 K. & J. 198; *Gyett v. Williams*, 2 J. & H. 429); and that such is the rule in that country has been recognized as late as 1877 (*In re Bellis's Trusts*, L. R., 5 Ch. Div. 504); and in 1879 (*Bray v. Stevens*, L. R., 12 Ch. Div. 162). Such is the rule in some of the States of the Union, and in the Federal Supreme Court. (*Hays v. Jackson*, 6 Mass. 149; *Wilcox v. Wilcox*, 13 Allen, 252; *Gallagher's Appeal*, 48 Penn. St. 122; *Robinson v. McIver*, 63 N. C. 649; *Moore v. Beckwith*, 14 Ohio St. 135; *Lewis v. Darling*, 16 How. [U. S.] 1.) We were urged to adopt this rule in deciding *Bevan v. Cooper* (*supra*); but, while we did not undertake to question the soundness of the reasoning in the decisions there cited, we had in mind the remarks of the chancellor in *Lupton v. Lupton* (2 Johns. Ch. 623), and of Potter, J., in *Myers v. Eddy* (47 Barb. 263); and as we could dispose of the case then without adopting or rejecting the rule, we did neither. Nor is it needed in the case in hand that we adopt the close rule above given, or question the correctness of *Lupton v. Lupton* and *Myers v. Eddy*. As we understand them, they assert that, unaided and alone, the words that make up the usual residuary clause of a will are not enough to evince an intention in the testator to charge a general legacy upon real estate. The devise here of the rest

and residue is not such. When we read the clause, we see that it first gives the rest, residue and remainder of the real and personal estate to his widow for life; it gives, after the death of the widow, a part of the real estate of that rest and residue and remainder to a daughter for life, and a part of the personal estate thereof to the daughter absolutely; and then gives the rest, residue and remainder (using the same phraseology again), not so given to the daughter, to four children, share and share alike. Now, there can be no question but that when he last used that phraseology he had defined in mind an actual residue that would remain after there had been parts of his estate set aside to his daughter, some for life and some in absolute right. We may well say that if those terms were used by him then, with that actual and distinct meaning, they had when used just before the same meaning; that in each case he meant by them to give that which was left after something which was before given had been taken out. The repetition of the terms with such a necessary practical application gives them a vigor and force wherever they occur in the will, which they might not have otherwise had. And, as in the last use of them, they of necessity signify that which has been left, when something that has been before named and given has been set apart, so they must, in the first use of them, signify the same. And as at the first use of them, the legacies to the grandchildren were substantially the whole of what was to be taken out, as the debts were but nominal, what was given by that use of the terms, whether it was real estate or personalty, was that residue thereof that would be left after the legacies had been paid. So that, in this case, we think that what we may term the residuary clause of the will is more significant of purpose than it was held to be in *Lupton v. Lupton* and *Myers v. Eddy*.

Third. The codicil contains a power of sale of the real estate. The power is given to the testator's widow. It is not to be exercised, however, save with the approval of each and every of the heirs of the testator's real estate. If the word "heirs," there, means either those who would have taken that real estate by descent had there been no valid will, or if it

means those who were interested in his whole estate, by reason of the provisions of the will, then it includes the grandchildren, the legatees. It is not to be conceived why the testator should have made their approval needful, unless he looked upon them as interested in the disposition of the real estate; nor why he looked upon them as interested in it, unless it was to be the ultimate resort for the satisfaction of their legacies. This provision of the codicil in this view would be a strong inherent indication of the testator's intention that the lands should be charged with the payment of the legacies. It is contended by the appellants that the word "heirs" was not used by the testator in either of these senses, but as designating those who by the terms of the will took the real estate after the decease of the tenants for life; that is to say, those who by the will would have an interest in the manner in which the real estate was to be disposed of under the power of sale. But this is to beg the question, which is, Who are those who by the provisions of the will are thus interested? If the intention of the testator was to charge the legacies upon his lands, then the legatees are interested in the sale of them. It is well, therefore, to inquire: What was the purpose of the codicil, the sole primary effect of which was to give to the widow a power of sale? That purpose was not in the testator's mind when he made his will. For he had by that carved two life estates out of it, before it all came to any one in fee and with power of absolute disposition. It is reasonable to suppose that something, which occurred after the making of the will and before or about the time of making the codicil, led the testator to give that power. The only thing that appears from the case to have come into his affairs to work that effect was the failure of his personal estate. When he made his will that, as we have seen, he could have reckoned at \$9,000. When he made the codicil, the mortgage that stood for that \$9,000 was worthless; and his personal estate other than that was household stuff and not to exceed \$200 of other assets. To our view, *a posteriori*, there were but two things for which he would have needed to have changed his purpose, and to have made the codicil giving a power of sale. It was not to pay

debts, for they, as is conceded, were but nominal. It was either that the widow might have the means of support, or it was to pay the moneyed legacies, or it was for both. The appellants, in their points, assume that it was to sell for her use; but there is nothing in the terms of the codicil that so indicates. Gathering the cause from the testamentary instruments, aided by the extraneous circumstances in the case, it was that money was needed where there was none. And gathering the purpose in the same way, it was that there might be money from which to supply the needs of the widow, and with which to pay the legacies. That the latter pressed upon the testator's attention we cannot but perceive. In 1868, when the will was made, the legatees were under age, and the legacies were made payable when the legatees reached twenty-one years of age. When the codicil was made two of them had reached that age, and another was near it. So that on the decease of the testator there would soon be need of money for the payment of the legacies. We must assume that the codicil was made in view of the provision in the will for these legacies, of the lack of personal property to pay them, of the fact that from nowhere but the real estate could money be got for the purposes of the estate, and that by the terms of the will and operation of law they would become payable soon after the death of the testator. It is a natural inference that the power of sale was given as well to raise money for the needs of the estate in the payment of legacies, as for the support of the widow. And if this was in the mind of the testator in making the codicil, it is as fair to interpret the word "heirs," if it was used by him out of its technical sense, as meaning all those interested in any way in his estate, as meaning any of them. It is so, then, that this power of sale thus given and thus worded is of much significance in getting at the intention of the testator. And we can but draw from it, that it was his purpose that these legacies should be met by money obtained from a sale of some or all of the lands. We think that these considerations fairly lead to the conclusion that it was the intention of the testator that these legacies should be paid at all events, and that all parts of his estate should be liable for the payment.

This is the only question in the case that seems to require our investigation. It is certain that it is needful that the real estate be converted into money, and the matter of a proper disposition of that money will be settled amicably, or by the order of the court below.

All concur. •

Judgment affirmed.

WILL OF STORER.

[28 Minnesota, 9.]

UNEQUAL DISTRIBUTION OF PROPERTY AS EVIDENCE OF UNDUE INFLUENCE. — PRIOR DECLARATIONS OF TESTATOR.

Upon an issue as to undue influence in procuring the execution of a will on the part of those who appear to be preferred in it, proof that the will is unequal in its distribution of the property, even though the testator was of impaired mind and memory, is inadmissible if there be no actual evidence of undue influence.

On such an issue, evidence that the wife of testator, who is one of those preferred by the will, had great control over him in the ordinary affairs of life, is inadmissible without evidence that her influence was exerted to procure the execution of such will.

Prior statements of a testator as to how he intended to dispose of his property, disconnected from the act of making his will, are not evidence of the fact of undue influence.

THE will of Joseph Storer having been presented to the Probate Court of Steele county for probate, by Gardner Storer, one of the executors named therein, its allowance was contested by Martha Elbina Zimmerman, daughter of the testator. This appeal is taken by contestant from a judgment of the District Court of that county, reversing a decree of the Probate Court.

A. D. Keyes, for appellant.

A. C. Hickman and *W. F. Sawyer*, for respondent.

GILFILLAN, C. J. The will of Joseph Storer, executed July 23, 1875, was, after his death, presented to the Probate Court of Steele county for probate. It was contested by this appellant, and the Probate Court refused to admit it to probate. From that order or decree an appeal was taken to the district court, where, after a trial of the issues presented by contest, a judgment was entered allowing and establishing the will. From that judgment the contestant appeals to this court. In the district court the following issues for trial by jury were framed: *First*. Was Joseph Storer of sound and disposing mind at the date of the alleged will? *Second*. Was the alleged will procured to be made through undue influence of Gardner Storer, Betsey Storer, Lucy F. Storer, or either of them? *Third*. Is the instrument now offered for probate the will of Joseph Storer? The jury found the first and third in the affirmative, and the second in the negative. The exceptions in the appeal are presented by bill of exceptions.

The objection is made that the findings are not sufficient to justify the judgment, because the facts constituting the execution of this will are not stated in the findings. Those facts are necessarily included in the finding on the third issue, and the testator's legal capacity is established by the finding on the first. There is nothing in that objection. So far as shown by the bill of exceptions, no proof was made or offered of any acts on the part of any of the persons named in the second issue of undue influence, or of any influence, over the testator, in respect to making the will. It does not appear even that any of them knew he was about to or intended to make a will.

The contestant offered to prove the amount of property the testator had at the date of the will, which proof was excluded. This is alleged as error. It is insisted that the proof would have shown there was great inequality in the distribution of his property among those naturally the objects of his bounty, and that that fact, in connection with evidence tending to show impaired mind and memory, which evidence was given, is evidence of undue influence on the part of those who seem to be favored by the will.

Where there is evidence, independent of any question of

inequality in the will, tending to show acts of undue influence over the testator to procure him to make the will, on the part of those who appear to be preferred, evidence that the distribution is grossly unequal may be given in aid of such evidence of undue influence to show indeed the result, as well as strengthen the evidence, of undue influence. But mere inequality, however great, in the distribution of the property among children or relatives, is no evidence of undue influence, nor is it made such by evidence of impaired mind. If it were evidence from which a jury might find undue influence to avoid the will, the issue practically presented to the jury in every case of the kind would be, Is the will such as the jury, if in the testator's circumstances, would have made? Few wills could stand if such were the test. Any man of sufficient capacity, where his power to dispose of his property is not limited by statute, has a right, in disposing of it by will, to use his own judgment and consult his own preferences, without regard to how such disposition may be approved or disapproved by others.

Contestant also offered evidence to the effect that, in the ordinary conduct of life, testator's wife, one of those claimed to have used undue influence to procure him to make the will, exercised great control over him; would order him about as one would a child, and he would obey. This was excluded, and properly. That a wife's influence over her husband, in the ordinary affairs of life, was great, without any evidence that her power of control was exercised with reference to making his will, is no evidence that she unduly influenced the will. It must be shown that her influence was exerted in a special degree to procure a will peculiarly acceptable to her. *Miller v. Miller*, 3 Serg. & R. 267; *Meeker v. Meeker*, 75 Ill. 260; *Zimmerman v. Zimmerman*, 23 Pa. St. 375.

An expert witness was called by contestant, and, after testifying that he had heard the testimony of witnesses named, was asked, in effect, if, assuming the statements of such witnesses as to symptoms and indications of testator to be true, the testator was of sound mind. The trial court might, in its discretion, allow or refuse to allow the question to be put in that

form. *Getchell v. Hill*, 21 Minn. 464; *State v. Lautenschlager*, 22 Minn. 514. Other questions were asked calling for his opinion as to whether certain specified symptoms, in connection with *other* testimony (not specified), indicated unsound mind. Of course, these questions, referring as they did to testimony, without specifying what testimony, were improper.

The first request of contestant for instructions to the jury was properly refused, because it included the proposition that mere inequality in the distribution of the property is, of itself, evidence of undue influence in procuring the will to be made. From contestant's second request the jury might have understood the court as stating the proposition which made the first request objectionable. It might, therefore, if given, have misled them. There are other objections to the request, but this was sufficient to justify the court in refusing it. The court, in its general charge, instructed the jury properly upon the correct propositions contained in the request.

The court, at proponent's request, instructed the jury that "statements of the testator, made prior to the making of the will, as to how he intended to dispose of his property, unless made so near the time of executing the will as to become a part of the *res gestæ*, are not competent evidence of undue influence, and are not to be considered by the jury in determining that question, unless they find from other evidence that some influence was actually exerted to cause the testator to make his will as he did make it, and then can be considered by them only in determining the effect which such influence had on his mind when making the will." So far as this indicates that the testator's statements as to how he intended to dispose of his property, if made so near the time of making of the will as to be a part of the *res gestæ*, may be evidence of the fact of undue influence, the contestant cannot complain of it, for it could operate only in her favor. The proposition contained in the instruction, that such statements, if disconnected from the act of making the will, are not evidence of the fact of undue influence, but are evidence only of the effect which influence shown to have been exerted on the testator to make the will had on his mind, is correct. When offered to prove external

facts, such as that influence was exerted to induce the testator to make the will, and that such influence was of the character which the law designates as undue influence, such statements are incompetent.

Judgment affirmed.

As to admission of testator's declarations on an issue of undue influence. *Dye v. Young*, *infra*, and references; *Will of Ames*, 1 Am. Prob. R. 35, and cases in note.

The constraint which will avoid a will must be one operating in the act of making the will. *Wainright's Appeal*, 1 Am. Prob. R. 48.

SMITH vs. RICE.

[130 Mass. 441.]

CONTINGENT REMAINDER.—GIFT OVER TO A CLASS REFERS TO THOSE LIVING AT EXPIRATION OF LIFE ESTATE.

Land was conveyed in trust to permit A. and others to use it during their respective lives, and, on the purposes of the trust being accomplished, to convey it to certain children of A. by name, "and such other children of A. as shall then be living." *Held*, that the children named took contingent remainders only.

BILL IN EQUITY by a trustee under a deed to obtain the instructions of the court. The case was reserved on the bill and answers for the consideration of the full court, and was as follows:

In 1837, Benjamin Weld and Elizabeth Weld, his wife, conveyed a parcel of land in Roxbury to a trustee (whose successor the plaintiff is) in trust to permit the grantors to use and occupy the land during their lives; upon the death of the grantors, to permit their son, Samuel H. Weld, to use and occupy the same during his life; on his death, to permit his widow, if she should survive him, to use and occupy the same so long as she should remain such; and "in trust, after the purposes

aforesaid shall be accomplished, to grant and convey the same to Elizabeth H. Weld, Susan Weld, Samuel H. Weld, Junior, children of said Samuel H. Weld, and such other children of said Samuel H. Weld as shall then be living, to them and to their heirs and assigns forever."

Samuel H. Weld survived the grantors and his wife, and died February 27th, 1879, never having had any other children than the three named in the deed; and after the death, during his life, of his son Samuel H. Weld, Jr., intestate and without issue, conveyed to his daughter Susan (now Mrs. Mansur) all his right, title and interest, as heir of his son, in the land in question, reserving his life estate therein. By his will, after a bequest to his daughter Elizabeth H. (now Mrs. Rice), he devised the residue of his property to his daughter Susan.

Elizabeth H. Rice claims one-half of the estate, on the ground that the gift of the remainder was contingent upon the children of Samuel H. surviving the life tenants.

Susan Mansur claims two-thirds of the estate, on the ground that the three children of Samuel H. Weld took each a vested remainder under the trust deed at the date of the conveyance; and that the share of her brother Samuel passed by descent to his father, and has come to her by his deed and will.

W. G. Russell, for Mrs. Rice.

A. Mason, for Mrs. Mansur.

GRAY, C. J. The gift in remainder, after the expiration of the equitable estates for life reserved to the grantors, and of those granted to Samuel H. Weld and his wife, is "to Elizabeth H. Weld, Susan Weld, Samuel H. Weld, Junior, children of said Samuel H. Weld, and such other children of Samuel H. Weld as shall then be living, and to their heirs and assigns forever."

There can be no doubt that the gift in remainder is restricted, so far as regards children not named therein, to such children as shall be living at the expiration of the last life estate; and the question to be determined is whether the restriction applies to the children named also.

The court is of opinion that it does. The language used by the grantors manifests their intention to be that no child of Samuel H. Weld shall have any actual or beneficial use of the property until after the expiration of all the life estates; and that "such other children of said Samuel H. Weld" than those named "as shall then be living" (if he shall leave any such other children) shall take equal and similar estates with those named. The legal effect is, that the children named and those not named (if any) together constitute a class, all the members of which cannot be ascertained until the expiration of the life estates; and that the vesting of the title, legal or equitable, in possession or in right, in those of that class who are named, as well as in those who are not named, is contingent upon their surviving the equitable tenants for life. (*Thomson v. Ludington*, 104 Mass. 193; *Turner v. Hudson*, 10 Beav. 222.)

It follows that the child who died before the last tenant for life took nothing, and that the remainder must be divided between the two surviving children.

Decree accordingly.

See *Pinkham v. Blair*, 1 Am. Prob. R. 114; *Elberts v. Elberts*, Id. 559.

BRANNOCK vs. STOCKER, ADM'R.

[76 Indiana, 558.]

BEQUEST FOR LIFE WITH REMAINDER OVER.—RIGHT OF LIFE-TENANT TO POSSESSION.

Where there is a general residuary bequest of real and personal property for life with remainder over, the legatee is not entitled to the possession of the personal assets, but the same should be invested by the executor and the interest or income paid to such legatee.

THE facts are stated in the opinion.

J. A. Harrison, R. Lake, E. P. Schlater and W. March,
for appellant.

M. S. Robinson and J. W. Lovett, for appellee.

MORRIS, C. The appellant filed her complaint in the Madison Circuit Court, stating that she is the widow of James Brannock, who died testate, on the — day of —, 18—; that, by his last will and testament, the said James Brannock bequeathed and devised to her, for and during her natural life, after the payment of his just debts and funeral expenses, all his property, both real and personal, and directing that, at her death, the same should be sold, and that two hundred dollars of the proceeds should be paid to his nephew, and the balance divided equally among his brother and sisters; that the appellee had been appointed by said court, in 1875, administrator with the will annexed, of the estate of said James Brannock; that all the debts of said estate, including the funeral expenses, had been paid by the appellee as such administrator, leaving in his hands, in notes and money, belonging to said estate, \$1,025 25; that the appellee, as such administrator, had reported these facts to said court, and that he could take no further steps in discharge of his duty, as such administrator, until the death of the appellant. She further stated that she had demanded of the appellee, as such administrator, the possession of the assets in his hands, but that he had refused to deliver to her the possession of the same, on the ground that she was not, under the terms of said will, entitled to such possession. A copy of the will of James Brannock is filed with and made a part of the complaint, and so much of it as bears upon the question presented for decision is in these words:

"Item 1. I give and bequeath to my beloved wife, Sally Brannock, after the payment of my just debts and funeral expenses, all my property, both real and personal, during her natural life, provided she survives me; and, at her decease, I will and direct that all the means, rights, credits and effects, property, real and personal, be sold.

"Item 2. And I further will and direct that two hundred dollars of the proceeds arising therefrom be first given to

James Brannock, Jr., my nephew, and son of Anderson and Milla Brannock, and the residue, it is my will and desire, be divided equally, share and share alike, between my brother and sisters."

To this complaint the appellee demurred. The demurrer was sustained, and, the appellant electing to stand by her complaint, judgment was rendered for the appellee. The ruling upon the demurrer is assigned as error.

The language of the will of James Brannock is not ambiguous or of doubtful meaning. The gift to the appellant is by way of a general bequest of the residue of the testator's estate for her life, with remainder over. There is no specific bequest to her. It does not appear from the facts stated in the complaint from what source the assets in the hands of the appellee were derived. The inference from the facts is, that they constituted a part of the personal estate of the testator. In such case, the rule is that the legatee for life is not entitled to the possession of the personal assets, but that the same shall be invested by the executor or administrator with the will annexed, under the direction of the court, and the interest or income paid to the legatee for life.

In the case of *Covenhoven v. Shuler*, 2 Paige, 122, substantially this case, the Chancellor says: "Where there is a general bequest of a residue, for life, with a remainder over, although it includes articles of both descriptions" (that is, grain and annual products of land, such as hay, &c., consumed in the use of them, and articles not thus consumed), "as well as other property, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income only is to be paid to the legatee for life."

It appears from the complaint in this case that the property which the appellant is seeking to recover consists of money and notes. It does not appear but that these assets are productive, and that the appellee is paying to her the income of the same. This he should do, and it is all that she should demand. If the appellee has failed, or shall fail, in the discharge of his duty, the appellant is not without remedy. If he fails

to render the fund productive, and pay to her the income, or suffers it to become endangered, the court, upon her application, would compel him to perform his duty in this respect, or discharge him at once and appoint another trustee.

It was formerly held, that, when the legatee for life offered ample security for the protection of those in remainder, the assets would be delivered to him; but this rule, it is said in the case above cited, no longer prevails.

There was no error committed by the court below.

The judgment of the court below should be affirmed.

Bequest of personal property for life, remainder over.—Who entitled to possession.—Where there is given in a will a life estate in personal property, with remainder over, the life tenant is not entitled to the custody or possession of the property, but may only receive the income. *Clark v. Clark*, 8 Paige (N. Y.), 152; *Saunderson v. Stearns*, 6 Mass. 37; *Wootten v. Burch*, 2 Md. Ch. 190; *Livingston v. Murray*, 68 N. Y. 485; *Freeman v. Knight*, 2 Ired. (N. C.) Eq. 72.

In some cases the life tenant may have possession of the property, upon giving to the remainderman an inventory. *De Peyster v. Clendining*, 8 Paige (N. Y.), 295; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Flanagan v. Flanagan*, 8 Abb. N. Cas. (N. Y.) 418; *Cohen v. Cohen*, 4 Redf. (N. Y.) 48; *Sampson v. Randall*, 72 Me. 109; *Hitchcock v. Clendennin*, 6 Mo. App. 99; *Williams v. Peabody*, 8 Hun (N. Y.), 271; *Freeman v. Knight*, 2 Ired. (N. C.) Eq. 72.

If there be some apparent danger of waste by the life tenant, he may be required to give a bond to the remainderman, as a condition of receiving the property. The right to require a bond seems usually to depend upon the risk established by the second donee. *Mason v. Pate*, 34 Ala. 379; *Clarke v. Terry*, 34 Conn. 176; *Tyson v. Blake*, 22 N. Y. 568; *Ackerman's Estate*, 7 Dally Reg. (N. Y.) 861; *Hower v. Shelton*, 2 Metc. (Mass.) 194; *Fiske v. Cobb*, 6 Gray (Mass.), 144; *Condict v. King*, 13 N. J. Eq. (2 Beas.) 375; *Rowe v. White*, 16 Id. 411; *Howard v. Howard*, 16 Id. 486; *Williams v. Colten*, 3 Jones' (N. C.) Eq. 395; *Pelham v. Taylor*, 1 Id. 121; *Horah v. Horah*, 1 Wins. (N. C.) 107; *Dean v. Hart*, 63 Ala. 308; *Montfort v. Montfort*, 24 Hun. 120; *Clevenstine's Appeal*, 15 Penn. St., 495; *Reiff's Appeal*, 60 Id. 361; *Sanford v. Gilman*, 44 Conn. 461.

If the life estate in the personalty be given to the widow of the testator, she is excused from giving a bond. *Hambright's Appeal*, 2 Grant's (Pa.) Cas. 320; *Duval's Appeal*, 38 Penn. St. 112; *Green's Appeal*, 43 Penn. St. 25; *Patterson v. Stewart*, 38 Mich. 402; *Brooks v. Brooks*, 12 S. C. 422. *Contra* *Welsch v. Belleville Savings Bank*, 94 Ill. 191.

If the legacy be money, a bond may be required upon payment to the life

tenant, but if it be a specific legacy, no bond can be required. *Eichelberger v. Barnitz*, 17 Serg. & R. (Pa.) 298; *Kinnard v. Kinnard*, 5 Watts (Pa.), 108.

Specific property, bequeathed in this way, must be sold, and proceeds invested for the benefit of the life tenant, unless there is something in the will to indicate a contrary intention. *Ritch v. Morris*, 78 N. C. 377; *Austin v. Watts*, 19 Mo. 298; *Golder v. Littlejohn*, 30 Wis. 344.

A gift of a fund with limitation over in the contingency of the legatee dying without lawful issue, entitles the legatee to the possession of the fund. *Hennion v. Jacobus*, 27 N. J. Eq. 28.

A bequest of the "use, income and interest," of personal estate for life, with limitation over, and a direction that the property remain in the hands and under the control of the executors, is not an annuity, but a life estate. *Stone v. North*, 41 Me. 265; *Whitson v. Whitson*, 58 N. Y. 479; *High v. Worley*, 32 Ala. 709; *Blackburn v. Hawkins*, 6 Ark. 50; *Roberts v. Brinker*, 4 Dana (Ky.), 570.

A bequest for life, with limitation over, of articles useful for consumption only, gives the life tenant an absolute estate. *Gentry v. Jones*, 6 J. J. Marsh. (Ky.) 148; *Swain v. Spruill*, 4 Jones' (N. C.) Eq. 364; *Deighmiller's Estate*, 1 Leg. Gaz. R. (Pa.) 499; *Gerwan v. Gerwan*, 27 Penn. St. 116; *Major v. Herndon*, 1 Rod. (Ky.) 123.

Such articles, *contra*, should be sold, and the proceeds invested for the benefit of the life tenant. *Smith v. Barham*, 2 Dev. (N. C.) Eq. 420; *Covenhoven v. Schuler*, 2 Paige (N. Y.), 123; *Calkins v. Calkins*, 1 Redf. (N. Y.) 337; *Harry v. Glover*, Riley's (S. C.) Ch. 53; *Woods v. Sullivan*, 1 Swan. (Tenn.) 507; *Harrison v. Foster*, 9 Ala. 955.

DELANEY vs. VAN AULEN.

[84 New York, 16.]

DEVISE OF SUM PAYABLE OUT OF RENTS AND PROFITS—RESORT TO CORPUS OF ESTATE TO SUPPLY DEFICIENCY OF INCOME.

Testatrix made a residuary devise of real and personal estate to her executors in trust, to receive the rents of the real estate and to invest the personal estate, and to apply such rents and the income of the personal estate to the use of her husband for life, except that they should apply to one D., who had been brought up by her, certain fixed sums per annum during his life, but no disposition was made of the fund after D.'s death. *Held*, that the legacy to D. was payable out of the annual profits of the estate, and the corpus of the estate could not be resorted to in the event of a deficiency of profits.

The chancery rule construing gifts of fixed sums payable out of rents and profits as authorizing the taking of a part of the body of the estate to make up a deficiency, is so far modified in this State as to make the question depend on the intention of the testator.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 11, 1880, affirming a judgment in favor of plaintiff, entered on a decision of the court on trial at Special Term.

This action was brought by plaintiff as legatee under the will of Mary S. Kirby, deceased, for a construction of the will, he asking that a provision for him "be adjudged to be a demonstrative legacy, payable out of the principal of the estate in case of a deficiency of income, and that defendant as trustee under the will be required to pay out of the estate an alleged deficiency."

The substance of the will in question and the material facts appear in the opinion.

Samuel Hand for defendant and appellant.

D. P. Barnard for plaintiff and respondent.

FOLGER, Ch. J. The testatrix, by her will, provided, first, for the payment of her debts and funeral expenses, and the purchase of a burial plot and the erection of a monument. She then made a specific bequest to a cousin of a few chattels of domestic or social use. She then devised and bequeathed to her executors, whom she named in her will, and to the survivor of them, all the residue of her estate, real and personal (she had both), in trust, to receive the rents and profits of the real estate, and to invest and keep invested the personal estate, and to apply those rents and profits, and the interest or income of the personal estate, to the use of her husband for his life, except that they should apply to the use of the plaintiff in this suit, who, the will says, was brought up by her, the sum of \$500 per annum thereout, till he reached twenty-one, after that \$1,000 per annum thereout during the life of the

husband ; and after his death \$2,000 per annum thereout, during the natural life of the plaintiff. There is no devise or bequest of the remainder after the death of the plaintiff, though she had a brother living when she made the will, and who survived her, and is the defendant in this suit, and the cousin above spoken of. At the date of the will, and at the time of the death of the testatrix, the rents and profits of the realty, and the income from the personalty, were ample to pay to the plaintiff the varying annuities contemplated by the will for him, and to leave a larger sum for the use of the husband. At those dates she occupied one piece of the real estate as a homestead ; other real estate yielded \$5,000 per annum. The personal property was a mortgage of \$18,000 at seven per cent. interest. Since her death, and since the death of her husband, in the mutations of affairs, the property has failed to yield enough to keep the real estate in good repair, to pay taxes and other incidental expenses, and to put the trustee in funds with which to pay the plaintiff his annuity. The plaintiff asks judgment in this suit, for a construction of the will ; and that the provision for him be adjudged a demonstrative legacy, payable out of the *corpus* of the estate, whenever there is a deficiency of rents and income ; and that a deficiency that had in fact arisen when the suit was begun be paid therefrom.

There can be no question that the testatrix, when she made her will, looked upon the rents, profits and income of her estate as enough to pay this annuity, to leave a larger sum for the use of her husband during his life, and for a surplus for her next of kin after his death. She designated the profits as the fund from which the sum should come with which to pay the annuity. But the inquiry may not stop there. It is to be pushed further, until it is learned whether she meant if that fund failed, that nevertheless the plaintiff should be paid his annuity every year in full, though the body of the estate should be impaired or consumed, and her husband in his lifetime, and her next of kin after his death, get nothing. This, at first blush, seems a purpose so extreme as not to be attributed to the testatrix, unless the words she has used, as construed by inexorable rules, and the circumstances of the case, clearly

lead thereto. The words of the will are to the effect that the rents, profits and income of the estate shall furnish the means to pay the plaintiff's annuity. They are given to the executors in trust to receive and apply. Generally speaking, the interpretation of the words "rents and profits" is, that they mean the annual rents and profits. (*Heneage v. Lord Andover*, 3 Younge & Jervis, 360; *Allan v. Backhouse*, 2 Ves. & Beames, 65.) If there were no contrary adjudication it could be fairly argued that a direction to raise money by annual rents and profits is to be put in contradistinction to a sale and mortgage. (2 Ves. & Beames, *supra*.) Indeed the Vice-Chancellor of England, in *Forbes v. Richardson* (11 Hare, 354), said: "I do not find any case where a direction for payment out of annual rents and profits has been held to give a right against the *corpus*, or beyond the annual or current rents and profits." This remark, however, in view of other decisions, must be confined to a direction, where the word "annual" is expressly or by most clear implication attached to the words "rents and profits." It is not too much to say, however, that the meaning most naturally to be got from a direction to take rents and profits, and thereout to pay a sum of money, would confine the means to pay to the moneys derived from the rents and profits as they came to hand from year to year, and would not extend to an appropriation of the body of the estate. Lord Eldon said, in *Bootle v. Blundell* (1 Mer. 192): "If I were asked this question anywhere but in Westminster Hall, I should answer in the affirmative, that by profits he probably meant annual profits only." Judge Cowen, in *Bloomer v. Waldron* (3 Hill, 361), indicates the same opinion, and says that the natural and obvious meaning of the words has been departed from in chancery to such a degree as may entrap a plain man; and that a forced and unnatural interpretation has been gone into in pressing exigencies. Yet that interpretation has become, with some limitations, a well-established rule of chancery. "Whatever might have been the interpretation of these words had the case been new, whatever doubt might arise upon them as denoting annual or permanent profit," says Sir Thomas Plumer, "it is now too late to speculate, this court having by

a technical, artificial but liberal construction, in a series of authorities, admitting it to be the natural meaning, extended those words, when applied to the object of raising a gross sum at a fixed time, when it must be raised and paid without delay, to a power to raise by sale or mortgage, unless restrained by other words." (*Allan v. Backhouse*, *supra*.) He cites and discusses many cases and adds: "The rule has now become an established one of construction, not permitting the court to exercise any discretion." That was in 1813. Two things are to be noticed in the first of these remarks, as somewhat limiting the extent of it. First, that the object of the power is to raise a gross sum at a fixed time, which must be raised and paid without delay, and, second, that the direction is not restrained by other words. Many of the cases are where legacies are to be paid out of the profits; a legacy is a gross sum, and generally to be paid at a fixed time and without delay. Some of them are cases of annuities which, though payable from time to time, are at each time of payment gross sums and payable at fixed times. An annuity falls within the rule, unless the other words of the will restrain it. We think, though, that later adjudications have somewhat relaxed the rule, looking at the purpose that first set it up, viz.: by a liberal construction of the words of the testator taking them to amount to a direction to sell, so as to obtain the end that the testator intended by raising the money. (2 Story's Eq. Jur., § 1064 a; *Green v. Belchier*, 1 Atk. 505.) So that it has come in the course of judgment, that not only the other words of the will may restrain the operation of the rule, but so may all other indications which courts are wont to note, in order to gather the intention of the maker of a disposing instrument in writing. The courts have been ready to take hold of the context of wills to hold the rule in check. (*Wilson v. Halliley*, 1 Russ & Mylne, 590; *Small v. Wing*, 5 Bro. P. C. [Tomlin's ed.] 66; 3 Younge & Jervis, *supra*.) And where the rule has been applied, the use of it has at times been justified, only by such being the intention of the testator as derived from all the words of the will. (*Schermerhorne v. Schermerhorne*, 6 Johns. Ch. 70.) Indeed, it may now be said that there is no principle

whatever involved in these cases, save to ascertain what is the testator's intention and to carry that intention into effect (*Baker v. Baker*, 6 H. of L. 616); wherein that construction is to be given, that under the circumstances appears to be the correct one, each case getting little aid from the authorities, and depending in a great degree upon its own circumstances and language. (Id., *per* Lord Chelmsford, Lord Chancellor; *per* Lord Cairns, L. J.; *Birch v. Sherratt*, L. R., 2 Ch. App. 642 [*644].) As expressed by Lord Cranworth, in *Baker v. Baker* (*supra*), the real question is, is that which is given, given as an annuity, or as the interest of a fund; does the language of the testator import that a sum at all events is annually to be paid out of his general estate, or only that it is the interest, or a portion of the interest, of a capital sum that is to be set apart. So Denio, J., says: "No positive rule of ready application to every case can be laid down, but each will depend upon a consideration of all the material provisions of the will to be construed, and of the extrinsic circumstances respecting the testator's family and estate, which may be fairly brought to bear on the question of intent" (see *Pierrepont v. Edwards*, 25 N. Y. 128), the authority of which case, it is plain, fettered the judgment of the learned General Term. He further says, that "the leading principle of the cases is that when the testator bequeathes a sum of money or, which is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund," and cites *Dickin v. Edwards* (4 Hare, 273). We cannot fail to perceive that the rigid rule stated in *Allan v. Backhouse* (*supra*) has been relaxed, and that the courts may now exercise their judgment. And the question arises in every such case, which was the primary and most material portion of the testator's intent, and which was, in his mind, the incident to such primary intention (Id.), and this may be gathered from the context of the will, and from such extrinsic circumstances as are properly taken into view in such a case.

Let us then look first at the will in all its parts. The devise and bequest is of the residue of the estate of the testatrix, real and personal, and though the trust is to receive the rents, profits and income, this does not prevent the vesting in the executors of the legal title during the life of the *cestuis que trust*. (1 R. S. 728, § 55, sub. 3; id. 729, § 60; *Craig v. Craig*, 3 Barb. Ch. 76-94.) The direction to keep the personal estate invested on bond and mortgage and in public stocks is not an indication of much weight that the body of the fund shall not be liable for the full and prompt payment of the annuity. Many of the cases to the contrary show equivalent directions. But the direction how to apply the moneys received by the executors has much significance. It reads thus: "To apply said rents and profits of real estate, and interest or income of personal estate, to the use of my husband William L. Kirby during his natural life." Here is not a direction to pay a fixed sum at a specified time, and without delay, but to devote that which is received, be it more or less, to the use of the beneficiary. Clearly this is not given as an annuity. It is given as the current avails of a fund. It does not import that a sum, at all events, is annually to be paid out of the estate, but only that the profits of a capital sum, that is to be set apart, are to be so paid. It is manifestly impossible ever to say, so long as the trust property yields any profits or income, that the husband is to have anything, more or less, than the sum annually yielded, or to have it from any other source than from the annual yield. In his case there never could be a claim that the body of the trust fund should be cloven in two to yield him a sum; for the query would be at once what sum? No sum is named that he is to have. There is no determinate time for raising it. (1 Atk., *supra*, p. 507.) He is to have rents and profits and income, be they more or less. He is to have them when they come in, be it sooner or later. As to her husband then, there is nothing to show an intention in the testatrix that the *corpus* of the estate should be taken for his use; rather the contrary is shown, that he is to have only annual rents, profits and income, though they vary in amount, from year to year. At once the query arises, did the testatrix intend, could she have intended,

better things for the youth she had brought up, than for the man she had married and lived with until death? Now the provision for the plaintiff is not, in the full sense of the word, one independent of that for the husband. It is grafted upon it. It is by way of exception from it. The executors are to apply all the rents, profits and income to the use of the husband, except that they shall apply to the use of James E. Delaney, thereout, the sums named in the will; one of them yearly, until he arrived at age; after that, another yearly during the lifetime of the husband, and after the decease of the husband, another yearly during his own lifetime. The money for Delaney is excepted out of other moneys. Those other moneys are to be raised in a certain way. Can the thing to be excepted out of another be raised in a different way from that other? If it can, and shall be, then it will not be money from those moneys, but other money, and not a part taken from those moneys. The effect of this exception, during the lifetime of the husband, is that the sum named for the use of Delaney was first to be deducted from the yearly avails of the estate, and the residue to be applied to the use of the husband. If Delaney had died during the husband's life, the latter would have taken the whole yearly avails. (16 N. Y. 368.) This was tantamount to a gift to the husband of a life-interest in the residue and overplus of the rents and profits, after the satisfaction of a certain yearly charge thereon. That form of gift has been held to be a manifest declaration, that the charge is to be satisfied out of the same rents and profits of which the residue is so given. (*Heneage v. Lord Andover, supra.*) It is true that she contemplated, as the will shows, that Delaney would survive her husband; but it shows also, that she contemplated that each would live after her, to take the provision made for him. We have seen that the provision for the husband does not bring the case within the rule invoked for this plaintiff. It is not to be said that an exception from that provision is greater and more forceful in this respect than the provision itself. For consider that the rule grew up, by the courts striving to carry out the intent of the testator, that a gift made by him should be enjoyed, though the particular means he

looked to and named for the purpose failed therefor. Now the intent of the testatrix here was as much, if not more, that her gift to her husband should be enjoyed, as that to Delaney should, and we cannot therefore say that she had an intention that Delaney's gift should be satisfied, to the impairment or consumption of the estate, for that would be the destruction of the gift to the husband and a thwarting of her intentions for him. Both intentions can be better carried out, by saying that the annual avails shall alone be used as far as they will go and the *corpus* be preserved intact to make an annual yield. For to attribute the other intention to the testatrix would be also to attribute to her an intention that in a possible event, not resulting from his conduct, her husband should be deprived of any share in her bounty, which would be discordant with all that the will and the circumstances show.

The will makes no disposition of the fund after the death of Delaney. A like fact, in other cases, has been given different effects. Here, it may have been without forecast, or in unconcern for the ultimate result. It is not certain how it was. She left a brother who was her only heir at law and next of kin. It is not impossible that she may have been advised that the law would give to him, or to his descendants, in the absence of a testamentary disposition, all of her estate that should remain after the death of Delaney. We do not think that the lack of an especial gift of the remainder furnishes, in this case, much indication of intention to charge the *corpus*. (See *Phillips v. Gutteridge, infra.*) We think that in other respects the form of the gift to Delaney indicates an intention that it shall be got from the annual avails. It is not in direct terms a gift to him of a sum out of the profits. It is an exception from a prior gift. The prior gift was, in the mind of the testatrix, the first thing. The way in which that was to be raised is the way not only for it, but for that which is excepted from it. If that is to be got from the yearly profits, then that which is to be deducted from it is also to be got therefrom. If the testatrix had had a different intention as to these two gifts, in this respect, she would have made distinct expression of it. But the same expression runs through the two

gifts. The rents, profits and income are to be applied to the use of her husband, except that thereout shall be a sum applied to the use of Delaney. We think, too, that it must be conceded that the trust to receive the rents and profits, and to apply to the use of the husband during life, and to a certain amount to the use of Delaney during life, is equivalent to a trust to receive during the lives of those beneficiaries, and the life of the survivor, and to apply. Then comes in the distinction noted, *Phillips v. Gutteridge* (3 De G. J. & S. *332), for the right to receive the profits is not general and indefinite; it has a limitation of time.

It is in the words of the will, too, that one of these beneficiaries was the husband of the testatrix, and that the other is the object of her favor from having been brought up by her. Naturally, we would think she would have preferred her husband, as an object of favor, to Delaney, and the will itself indicates that she did, in its larger provision for the former. We are aware that Lord Eldon said, in *Bootle v. Blundell*, *supra*, that circumstances *dehors* the will, such as the greater degree of personal favor which the testator must be presumed to have felt toward this or that object of bounty, ought to be set aside on a question like this, which is fit to be decided only by an examination of the whole will taken together. Here, however, the will itself gives to some extent the basis for the presumption, in its description of the beneficiaries, and in the greater sum intended for one. Besides, it seems now to be a recognized aid to construction, that one or the other beneficiary named appears to be the primary object of the testator's bounty. (*Per* Selden, J., *Giddings v. Seward*, 16 N. Y. 365-367.)

We may now see whether there is any extrinsic circumstance that will show an intention in the testatrix. (*De Nottebeck v. Astor*, 13 N. Y. 98.) The extrinsic circumstance most significant is, that during the life of the testatrix, at the time she made her will and from thence until her death, the avails of her estate were ample to carry out her directions, without trenching upon the body of it. She well knew that this was so. It does not appear that she had any reason to apprehend that

it would not measurably continue to be so. She was not engaged in business, we may assume; so that there could be no great indebtedness to meet. She made no provisions prior to the gift of the residuum that would take largely from the estate, so that there would be no material diminution of it before it reached the trust fund. The estate was not exposed to the hazards of business, and might well be looked to as stable. It was left by her to the executors, just as she had kept it in her life and found it sufficient for her needs. She shaped her purposes by measurement of them with it, and gave it with no direction for a change of its condition, but rather with the implied direction to keep it in like state. To be sure, it must be so in most cases, that the testator anticipated that the profits would be enough to carry out his purpose, and his anticipation must have failed, or the question would not have come into the courts, whether the *corpus* could be invaded. Yet that the anticipation well founded is, sometimes, of some effect in arriving at the intention, is seen from *Baker v. Baker* (6 H. of L. Cases, *supra*), where the Lord Chancellor argued against a construction that would take from the fund itself to make up a deficiency of annual avails, that such a course might, in time, utterly annihilate the *corpus*, and the beneficiary be left without any provision at all; and that, therefore, nobody could suppose that such an intention could ever have existed in the mind of the testator—an idea which is peculiarly applicable here, as it would not take long, if the whole or a large part of the annuity is to be paid yearly from the fund, to exhaust it entirely.

For these reasons we think that the intention of the testatrix was that the gift to the plaintiff should arise from the annual profits of the estate only.

We have not considered the question, whether the plaintiff has the right to have deficiencies in yearly payments made up from increased avails in after years, for the reason that neither the pleadings nor the facts present the question.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

GARLAND *vs.* GARLAND.

[73 Maine, 97.]

LIFE ESTATE ON CONDITION.—PAYMENT OF TAXES BY LIFE TENANT.

Under a will reading "and it is my desire that if O. G. shall pay the interest annually, on what is due from him, to wit, on \$541, that he be not disturbed in his possession of the place where he now resides," *held*, that O. G. took a life estate in the premises on condition that he paid the interest required, and further, he should pay all taxes assessed during his life tenancy.

BILL in equity to obtain a construction of the will of James Garland. Heard on bill, answer and proofs.

The opinion states the case.

A. W. Paine, for plaintiffs.

R. G. White, for the defendant.

BARROWS, J. In March, 1866, James Garland bought and took a deed of a piece of real estate containing about eighty acres, paying therefor \$550, apparently with the design to secure a place for his brother Orlando (who had been impoverished by a fire) to live on. He seems to have permitted Orlando to take possession of it and make improvements on it. In 1869 he made his will which, shortly afterwards, in July of that year, was duly proved and allowed in the Probate Court. The clause in it, which we are asked to construe, runs as follows: "And it is my desire that if Orlando Garland shall pay the interest annually, on what is due from him, to wit, on \$541, that he be not disturbed in his possession of the place where he now resides." During James' life Orlando paid the taxes assessed upon this place. He has continued to occupy it from the first and it has been assessed to him as the person in possession, according to R. S., c. 6, § 9.

For some years after James' death he paid the interest called for in the above item, and the taxes. Latterly he has declined to pay the interest unless he might be permitted to

deduct the amount required to pay the taxes. Hence this process, brought by the heirs of James Garland, to have the rights, interests and duties of the parties under the foregoing clause in his will, ascertained and declared.

James Garland seems to have supposed that Orlando would eventually become the purchaser of the property, and that he had, with that view, up to the time of the making of the will paid the interest and a trifling amount of the principal of James' outlay for the place. But the respondent denies the existence of any contract for the purchase, and as there was none in writing signed by the parties, it is clear that there could be none which would be binding on them or their successors, in law or equity. It is not necessary to decide any of the questions of fact about which the parties differ and offer conflicting testimony; for without resort to any of these matters, which, however determined, would not affect the construction of the clause in question, the rights and duties of the parties respectively may be readily ascertained.

We think that James Garland gave by his will to his brother Orlando a life-estate in this piece of property, upon condition that Orlando should pay annually to those lawfully representing his estate the legal interest on \$541. It follows from this that Orlando should pay the taxes while he possesses the estate. *Transit terra cum onere. Qui sentit commodum, sentire debet et onus.* "It is the duty of the tenant for life to cause all taxes assessed upon the estate, during his tenancy, to be paid," says Shepley, J., in *Varney v. Stevens*, 22 Maine, 334. If the tenant for life neglects to pay the taxes assessed upon the estate during the tenancy and thereby subjects the estate to a sale, the reversioner may maintain an action of waste against him to recover the place wasted and the damages. *Stetson v. Day*, 51 Maine, 436.

This duty of paying taxes is entirely independent of the condition imposed by the testator, which calls for the payment of a certain sum annually to his estate in order to entitle the devisee to retain the possession during his life; and the testator says nothing to exempt the tenant for life from its performance. It was the plain duty of the respondent to pay the taxes

assessed upon the property as well as the interest to those entitled to it; and the payment of the taxes affords him no ground to claim a rebate upon the interest. He is poor, it is said; he is likely to remain so if he exposes himself to the expense of litigation and his estate to forfeiture in the hope to avoid the payment of the very few dollars which were in dispute here. Yet, doubtless, equity will permit him, upon repairing waste unwittingly committed, to be relieved from forfeiture incurred. His poverty, of itself, is no reason why he should be relieved from the payment of costs when it is found that he is in the wrong. But it is apparent also that the heirs of James Garland had an interest in having it judicially determined whether his interest in the estate extended beyond the term of his own life, and in having some record evidence of the character of his possession. It turns out that he claims only a life estate and admits his possession to be in its origin permissive and not adverse. Looking at the two-fold object of the process, we think the plaintiffs may well bear a portion of the expenses.

They may tax against the respondent, officer's and clerk's fees and the cost of printing. As to all else let each party pay his own costs.

Decree to be entered in conformity herewith.

See *Nevius v. Gourley*, 1 Am. Prob. R. 53. .

LOVELL EXECUTOR *vs.* QUITMAN.

[88 New York, 377.]

REVOCATION OF SINGLE CLAUSE BY OBLITERATION.

Under a statute that no will or any part thereof shall be revoked or altered except by a new will or instrument executed with similar formalities, or unless such will be burnt, torn, canceled, obliterated or destroyed, with intent to revoke, an obliteration to be effectual must destroy the whole will, an obliteration of a single clause is of no effect.

APPEAL from the General Term of the Supreme Court affirming a decree of the Surrogate of Ulster county. The material facts are stated in the opinion.

J. Newton Fiero, for appellant.

S. L. Stebbins, for respondent.

DANFORTH, J. The surrogate found that the will in question was well executed, and at that time contained, among others, clauses numbered respectively "2d" and "4th;" that subsequently the testatrix obliterated these clauses "with a purpose and intent" to revoke the same; that, notwithstanding this obliteration, they were not revoked, and remain in full force and effect, as before. The words are still apparent and legible, and he directed the whole will, including these clauses, to be admitted to probate. The General Term has sustained that decision, and, although we have given careful consideration to the interesting argument of the appellant, we see no reason to reverse their judgment.

The appeal depends upon the true construction of the statute (2 R. S., part 2, chap. 6, tit. 1, art. 3, p. 64, § 42), which enacts that "no will in writing, * * * * * nor any part thereof shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will

itself was required, by law, to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed with the intent and for the purpose of revoking the same, by the testator himself, or by any other person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."

First. A literal and plain reading of these words defeats the appellant. There is language of prohibition, but it is so qualified as to amount to permission to revoke or alter a will, or any part thereof, by some other will in writing, or some other writing of the testator declaring such revocation or alteration; or by burning, tearing, canceling, obliterating or destroying the will, "for the purpose of revoking the same." Now, by the first phrase, the repentant testator is required to write out the proposed alteration, select his witnesses and make to them an acknowledgment or declaration that the act is his; and, so far, the language permits but one inference or construction; that that act becomes effectual whether it relates to the whole will, or some portion only of the will.

The second clause requires no such construction. The words "or any part thereof," are omitted. The "will" itself is to be burnt, torn, canceled, obliterated or destroyed, not with an intent or purpose of "altering," but, as the statute says, "with the intent and for the purpose of revoking the same." And while these things may be done, either by the testator or by another person in his presence, under his direction, yet the statute provides, that "when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction shall be proved by at least two witnesses." The injury relates to the effect of burning, tearing, canceling and obliterating.

We see, therefore, that, under the first clause, an act of alteration or revocation, if in writing, and under the last clause of an act of destruction or of injury, unless by the testator himself, is required to be proved by witnesses. Can it be supposed that the statute intended a partial revocation or alteration, if done by the testator himself, should be effective,

although no formality was observed? According to the appellant's construction, a dash of the testator's pen supplies the place of the formality required by the first clause, renders unnecessary the presence of two witnesses, and becomes effectual to the same extent as if the above provisions of the statute had been observed.

Such a conclusion is inadmissible. The dissimilarity of the two events, one requiring and the other dispensing with formalities the most solemn known to the law relating to the execution of papers, seems to permit but one answer to the appellant. The two acts cannot be deemed equivalents. To the same end is the general policy of the law, which aims to close the door against opportunities of fraud, and it would be unreasonable to suppose that the legislature intended a method by which the purpose of the testator could be defeated and the restrictions thrown around him at the time of executing the will designed to carry that purpose into effect, evaded.

The provisions of the statute applicable to wills (2 R. S., part 2, chap. 6, art. 3, title 1, p. 63), which include the one before us, have in view not merely the inconvenience of the individual and his protection, but also the prevention of fraud and perjury in reference to an act which becomes effective only after the death of the testator, and then concerns his devisees, his heirs, and indirectly the whole public.

Second. The appellant resorts to implication, and imports into the second clause of the statute words which are found only in the first, thus violating not only the method of the legislature, but the grammatical reading of the sentence. This last consideration would be of little importance if there was anything in the statute from which it appeared that the apparent grammatical construction could not be the true one, but should control unless there is some strong and obvious reason to the contrary; as if we could see that the legislature had a different intention. But when we find in the first clause that the will or any part thereof, can be altered by a writing only when duly attested, and in the second clause the words "or any part thereof" omitted, we are bound to give effect to the specific words actually used, and say that no obliteration can

be effective as to part, unless it altogether destroys the whole will. We have no power to interpolate other words.

It is true, as the learned counsel contends, that there are cases lending some support to his contention; but they depend upon different statutes, or come from courts whose decisions are subject to review. In the courts of this State the decisions are conflicting. On one side is *McPherson v. Clark* (3 Bradf. 96), cited by the appellant; on the other is *Quinn v. Quinn* (1 Thompson & Cook, 437), and *Matter of Prescott* (4 Redf. 178). This is the first time the question has been presented to this court. And while we have examined the learned opinion upon which *McPherson v. Clark* (*supra*) was decided, we are not satisfied that the conclusion would promote justice, or secure the end which the legislature sought in enacting the provisions in question.

The course of legislation also sustains the conclusion reached by us. It has no doubt been held in England, as the learned counsel for the appellant claims, that such an obliteration as the one before us would effect a valid change, and not prevent the probate of the will. But the cases referred to by him, of which *Swinton v. Bailey* (*supra*, L. R., 1 Ex. Div. 110) is the latest, were under a statute passed in the year 1677 (29 Car., chaps. 26, 36), declaring that "no devise, * * * or any clause thereof, shall be revocable otherwise than by some other will * * * or by obliteration of the same." It was held under this statute that a single clause could be removed and the remainder of the will stand; and so it is laid down in 1 Jarman on Wills, page 134, where the author says: "If the testator draws a pen over part of the will only, a revocation is effected *pro tanto*, and the unobliterated parts remain in force." This observation, however, can be sustained only with reference to the above statute, and *Swinton v. Bailey* brought before the court a will made in 1828, and altered prior to 1837, at which date, as we shall see, a different statute went into effect. But the English statute already quoted found its place in our laws in 1787, entitled "An act to reduce the laws concerning wills into one statute." (Laws of New York, Greenleaf's ed., vol. 1, p. 387, § 3), and if now in force would require

a construction similar to that given to the English statute (*supra*). The various modes of alteration or destruction apply to the whole devise or will, or any clause thereof. The order in which the events are named adds force also to the construction, and so do the concluding words, which perpetuate the will and each clause until one of the two events occurs.

But this statute was repealed, and in 1801 (Laws of N. Y., chap. 9, § 3, p. 180), a law was passed substantially in the words afterwards placed in the Revised Laws of 1813 (vol. 1; chap. 22, § 23), and now forming part of the Revised Statutes of 1830 (*supra*), and under which the question now before us has arisen. There is a plain difference between the words of the act of 1787 and those of the statute adopted in 1801, now in force as part of our Revised Statutes. The change is too great to have been accidental, and the omission of some words and the substitution of others, as well as the different arrangement of those remaining, require a construction of the present statute which would not have been permitted under the first. The construction contended for by the appellant compels the insertion of words which the legislature have intentionally omitted, and makes the court the creator of a law, rather than its interpreter.

The mischief intended to be prevented by the observance of formalities in the execution of a will would reappear if the instrument could be altered in any less formal way, and as we are required by no case of controlling authority, or by continued usage, to give the statute an interpretation other than the one suggested by the plain meaning and grammatical structure of the section, we must hold with the surrogate and the General term that the clauses obliterated from the will are still in force.

It is also to be observed that by the statute now in force in England (1 Vict., chap. 26), entitled "An act for the amendment of the laws with respect to wills," passed July 3, 1837 (§§ 20, 21), a similar change is made in the laws of that country, and such an obliteration or other alteration is not now effectual unless executed in the manner prescribed for the execution

of a will. (*Burgoyne v. Showler*, 1 Rob. Ecc. 5; *Cooper v. Bockett*, 4 Moore's P. C. 419.)

It would seem, therefore, from the modification of the English statute, as well as our own, that the construction we have adopted best expresses the intention of the legislature. It certainly gives effect to the actual words of the law, and we see no reason for extending it. A contrary doctrine would be fatal to the authority of documents, subversive of the rights of parties, and would completely abrogate the statute. (*Cooper v. Bockett*, *supra*.)

It follows that the judgment appealed from should be affirmed.

All concur, except ANDREWS, Ch. J., absent.

Judgment affirmed.

See Woodfill v. Patton, *ante*, page 200, and cases in note.

LIVINGSTON, EXECUTOR *vs.* GORDON.

[84 New York, 136.]

BEQUEST TO INSTITUTION ON CONDITION IT MAINTAIN CERTAIN INDIVIDUAL—CONDITION SUBSEQUENT.

Testator gave a sum of money to his executors in trust, to pay the income to the New York Home for the Blind, so long as it cared for one William Gordon, and the principal to such institution if it cared for him during his entire life. If such institution was not maintained suitably for the care of the blind then the income should be paid to any other society selected by Gordon which might maintain him, and the principal should go to such society as was maintaining him at the time of his death. *Held*, that the bequest was valid; that the maintenance of Gordon was a condition subsequent and an offer by the home to care for him, made at the testator's death, entitled it to the legacy irrespective of the fact that previously Gordon had been expelled from the home for breach of its rules.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 22, 1880, affirming a judgment entered upon a decision of the court on trial at Special Term.

This action was brought to obtain a construction of a provision in the will of Ernest S. McCrackan, deceased.

This will was dated the 11th day of October, 1875; the testator died in February, 1878. The provision of the will referred to is as follows: "I give and devise to my executors the sum of \$32,000 in trust to invest the same and pay the interest thereof semi-annually to the New York Home for the Blind, at No. 219 West Fourteenth street, so long as that institution shall maintain and care for William Gordon, now an inmate of that institution, and in case he shall be so cared for and maintained during the balance of his life, then in trust to pay the principal sum of said \$32,000 to said institution. And in case the said society shall cease to exist or to maintain an institution suitable for the care of the blind during the life of said William Gordon, then in trust to pay the income of said \$32,000 to any other society that will maintain and care for said William Gordon, and which he may select, and to pay the principal of said \$32,000 to such society as shall at the death of the said William Gordon be supporting and maintaining him."

At the date of the will the William Gordon therein mentioned was an inmate of the institution maintained at 219 West Fourteenth street in the city of New York by the defendant "the Society for the Relief of the Destitute Blind of the city of New York."

In October, 1877, William Gordon was expelled from the home of the said society for refusal to comply with some of its rules, and has never since been an inmate of the institution and refuses to become an inmate thereof. On the 25th of August, 1878, the said William Gordon, after he became acquainted with the contents of said will, selected the defendant, the St. Joseph's Home, as the society or institution to care for and maintain him, and he has ever since been and now is an inmate of the last-named institution, and is cared for and maintained by it without compensation. In May, 1879, the defendant,

The Society for the Relief of the Destitute Blind, having learned of the provisions of Mr. McCrackan's will, informed the said Gordon that they were ready and willing to care for and maintain him at their institution, or elsewhere, during his life, in conformity with the requirements of said will; this he refused.

John E. Develin, for appellants.

Robert A. Livingston and Sidney S. Harris, for respondents.

MILLER, J. There can, we think, be no doubt as to the validity and legality of the bequests made by the testator, which is the subject of this controversy, and the only question presented is as to the construction to be placed upon the language employed and the terms and conditions upon which the bequest was made.

By the will of the testator he gave to his executors the sum of \$32,000, in trust, to invest the same and pay over the interest to the New York Home of the Blind, so long as that institution should maintain and care for William Gordon, who is stated to be an inmate of the same; and in case he shall be cared for during the balance of his natural life, then the principal sum was to be paid to the institution. In case the society ceased to exist or to maintain an institution suitable for the care of the blind during the life of Gordon, then the income was to be paid to any other society that would maintain and care for Gordon, which he might select, and the principal should be paid to such society as should at the death of Gordon be supporting and maintaining him.

Although Gordon was an inmate of the institution at the time of the making of the will, he had left at the time of the testator's death. The will speaks from the latter date, according to a well-settled rule of law, and it must be construed having in view the purpose designed to be accomplished. The intention of the testator evidently was to accomplish two objects: first, the support of Gordon; and second, to make a bequest to the institution for the benevolent purposes for which it was

organized and carried on. These were co-ordinate and of equal consequence in his mind, and both are to be attained if practicable. The statement in the will that Gordon was "an inmate of the institution" alone is of no importance if the testator's intention can otherwise be carried into effect. The words employed were merely intended as a designation of the beneficiary, and were not a condition of the bequest. If Gordon had left without cause, prior to the testator's death, certainly it could not affect the right of the society to the legacy if it was willing to conform to the conditions imposed by the testator. The whim and caprice of Gordon could not control the right to the legacy; and, unless there was a refusal to support him, and to comply with the requirements of the testator after the bequest was known to the society, the right of the same remains unaffected. The legacy is not bequeathed to Gordon solely, and he has only an interest in it to the extent of a support for life, which consists in the performance by the society of the obligations required by the testator's will. His right, then, is not in any sense to the legacy, but his claim is upon the society; or if it fails to conform to the requirements of the will, upon such other society as may be substituted in its place. The society is entitled to the income, and in conformity with the will must maintain Gordon, not from the income derived from the legacy, but out of such funds as it may have from all sources of revenue.

These remarks brings us to a consideration of the question whether the society has failed substantially to comply with the terms imposed by the testator, or done any act which forfeits its right to the legacy. Upon learning of the provisions of the will through the medium of its proper officer, Gordon was notified in writing that the society was ready and willing to care for and maintain him at its institution or elsewhere during his life, in conformity with the will of the testator. We think the expulsion of Gordon prior to the death of the testator has nothing to do with the right of the society after his death, and the real question is whether it was since then and at the present time it is ready and willing to accept the legacy. We do not deem it necessary, therefore, to inquire whether the

expulsion of Gordon was or was not without sufficient cause, and it is enough to say that when the society ceases to support Gordon and to carry out the benevolent object of the testator in this respect, it will be time to consider whether it has forfeited all right to claim the benefits of the legacy in question. And until this period arrives, it must be held that its right to receive the interest is clear and beyond any question.

It evidently intended, by the notice given to Gordon, to obviate objections of all kinds, for it virtually agrees to support him at any place which may be reasonably designated. The terms of the bequest do not require absolutely and unequivocally that the institution shall maintain and support Gordon within its own precincts; but if for any sufficient reason he cannot conform to the rules and regulations, he may, within the terms of the notice given to him, select some other institution or place at its expense, and thus be cared for and supported. Gordon has a right to return and become an inmate of the institution; and while he is bound to observe all reasonable rules of the "Home," if for any just cause this cannot be done, he may be maintained at its expense in some other similar institution. If he chooses to refuse to accept the offer to maintain him, and to be absent without cause, it does not take away the right to the legacy. (*Hogeboom v. Hall*, 24 Wend. 146; *Jackson v. Wight*, 3 Id. 109.) The maintenance of Gordon is a condition appended to defendant's right to receive the legacy and the income, and if the society fail to perform what is reasonably demanded in this respect, and willfully or unjustly refuse to render the support required, or impose any unjust, onerous or improper conditions or restrictions, such conduct would necessarily forfeit its right to the legacy. There must be a reasonable, fair and substantial performance of the condition; and when this is done it is sufficient. (*Tanner v. Tebbutt*, 2 Y. & Col. 225; Roper on Legacies, 767.)

It may also be remarked that by the acceptance of the legacy by the society it became lawfully bound to support Gordon (*Gridley v. Gridley*, 21 N. Y. 130; 2 Redf. on Wills [2d ed.], 804); and this without regard to the condition whether the in-

come is sufficient for that purpose (*Smith v. Jewett*, 40 N. H. 530); and however burdensome. (2 Redf. on Wills, 304.)

The support of Gordon at the "Home" of the defendant is a condition to be performed after the acceptance of the bequest; and while a beneficial interest is given in the legacy, it is required that Gordon should be maintained. His maintenance is a condition subsequent; and when it becomes impossible to perform such a condition, the estate will not be defeated or forfeited. (*Martin v. Ballou*, 13 Barb. 135; *Dommett v. Bedford*, 6 Term R. 684; *Finlay v. King's Lessee*, 3 Pet. 346, 374.) In such cases the estate continues the same as if no condition was attached. If Gordon refuses to return and live at defendant's institution or to be provided for according to the offer made to him, thus rendering it practicably impossible for the society to bestow upon him the benefits intended by the legacy, it cannot affect its right to the same. The reasonable and true construction of the condition of his support is, that the testator only intended that he should be maintained there if he so desired, and that he was not absolutely bound to live there. In the latter case, however, it was not designed that his refusal, which renders a strict performance impossible, should deprive the society of the legacy.

These views lead to the conclusion that the devise to the defendant was valid in law, and that it has not been forfeited, and it remained vested in the defendant until an absolute failure to support Gordon as required, in case he was willing to be supported, or until the society shall cease to have a lawful existence or to maintain an institution suitable for the care of the blind during the life of Gordon.

A further result also follows, which is that the defendant, St. Joseph's Home for the Aged, has no interest in or right to the legacy in question. Nor has Gordon any right of selection under the circumstances existing, or any claim upon the legacy otherwise than herein stated. The time has not arrived when he is entitled to exercise any such right, and his choice is of no avail. Nor is it essential, in the present aspect of affairs, that any provision should be made in anticipation of the society for any reason ceasing to support Gordon during his

life, as in such a contingency ample relief could be obtained as already indicated.

We have given due consideration to the various points and suggestions made by the several counsel, and we discover no occasion to change the judgment of the Special Term, except that portion of it which makes a final disposition of the principal of the fund, and directs that in case the Society for the Relief of the Destitute Blind shall during the life of William Gordon be not supporting and maintaining, or be unwilling to maintain and support him at its own institution or elsewhere at any time during his natural life, the executors shall pay the balance to the residuary devisee. No facts appear which require any such provision to be made, and it will be sufficient to make such a disposition of the fund when rendered necessary by the happening of the contingency which requires it, and until then it is not authorized. In this respect the decree should be modified; and otherwise it must be affirmed, and neither party should have costs as against the other upon this appeal.

FOLGER, Ch. J. I concur in this result and in the opinion, but wish to add some words.

The opinion says that Gordon is "bound to observe all reasonable rules and regulations of the home." As a general proposition this is true. But what may be reasonable rules and regulations of the home for its patients in general may not be reasonable for one taken within its walls in the circumstances and under the conditions wherein Gordon is to be received. For instance, no one in this community can reasonably object that the home should have religious observances, under rules and regulations applicable to all patients, or patients who come into it as a favor sought by them. But in such a case as that of Gordon, who is more like a patient who confers a favor by going into it, and who need not be taken or go unless it is with the will and wish of the home, I think that there should be a scrupulous regard for the compunctions or even whims of his religious feeling; that his desires or his repugnances in that respect, be they convictions of faith, or prejudices of sect,

or blind followings of early training, should be yielded to and accommodated; and that he should not be required by general rules, or otherwise, to attend religious services that are not agreeable to him.

All concur with MILLER, J., except RAPALLO, J., dissenting, and ANDREWS, J., concurring in result.

Judgment affirmed as modified in accordance with opinion of MILLER, J.

Devises on conditions subsequent.—Where there is a devise or legacy on a condition subsequent, the performance of which becomes impossible by act of God, or without fault on the part of the devisee or legatee, the estate becomes absolute and freed from the condition. *McLachlan v. McLachlan*, 9 Paige, 534; *Merrill v. Emery*, 10 Pick. 507; *Bradstreet v. Clark*, 21 Id. 389; *Parker v. Parker*, 128 Mass. 584; *George v. George*, 47 N. H. 27; *Petro v. Cassiday*, 18 Indiana, 289; *Laurens v. Lucas*, 6 Rich. Eq. 217; *Martin v. Ballou*, 18 Barb. 135; *Finley v. King's Lessee*, 8 Pet. 343, 374; *U. S. v. Arredondo*, 6 Id. 745; *Hutchin's Estate*, 9 Phila. 800.

But if the condition is held to be a condition precedent, it destroys the gift. *Culius' Appeal*, 20 Penn. St. 243; *Stover's Appeal*, 77 Id. 282; *Mosely v. Baker*, 2 Sneedon, 362; *Jones v. Walker*, 18 Ben. M. 163; *Makay v. Moore*, Dud. (Ga.) 94; *Five Points House of Industry v. Cornell*, 11 Hun, 161.

Where the enjoyment of a legacy is made to depend upon a condition subsequent, the performance of which depends alone upon the legatee, who had the power to do what is required, and he fail to perform it, such a failure will work a forfeiture of the legacy. *Huckabee v. Swoope*, 20 Ala. 491.

Where land was left to a society on condition that it should not be aliened, the condition was held to be a condition subsequent, and, even though void, it was held not to vitiate the gift. *Jones v. Habersham*, 8 Wood's C. Ct. 443.

A devise was made to a sister on condition that she, within one year after the testator's death, become reconciled to her brothers and sisters, she having expressed her willingness to be reconciled to them within the prescribed time, her estate was held not to be defeated by their refusal to have anything to do with her. *Page v. Frazer*, 14 Bush, 205.

Where the testator directed an annuity to be paid to a nephew, provided he was educated for the ministry at a certain specified Presbyterian Educational Institution, it was held that the fact that there was no such institution in existence as the one named in the will, would not defeat the legacy, the nephew having been educated and prepared to enter the ministry of the Presbyterian church elsewhere. *Heddleson's Estate*, 8 Phila. 602.

An insensible condition subsequent annexed to a charitable devise will not avoid it, there being no devise over. *Newall's Appeal*, 24 Penn. St. 197.

See, also, *Hammond v. Hammond*, *ante*, page 119, and references on page 125.

DENIKE vs. HARRIS.

[84 New York, 89.]

SECURITY ON LOAN WHEN NONE REQUIRED BY WILL DIRECTING IT.

The creator of a trust requiring the investment of money may designate how the investment may be made and what security may be taken, and he may dispense with all security.

Testator directed his executors to allow his copartner to retain his contribution to the firm capital to be employed in conducting the business for not longer than three years, with annual payments of interest. *Held*, that such copartner was not compellable to give any security for the loan.

APPEAL from a judgment of the General Term affirming a judgment in plaintiff's favor at Special Term.

The nature of the action and the facts sufficiently appear in the opinion.

S. P. Nash, for appellants.

Homer A. Nelson, for respondents.

EARL, J. For some time before his death the testator was a special partner of the defendant in the business of selling agricultural implements; and as such special partner he had contributed to the capital of the partnership the sum of \$15,000. On the 1st day of January, 1879, an account then taken of the assets and condition of the partnership showed his interest therein to be the sum of \$17,908. On the 17th day of July thereafter he made and published his will, in which he nominated his partner, Reeves, and the defendant Harris as his executors; and he died on the 6th day of September, 1879. The will was subsequently admitted to probate, and the executors qualified and entered upon their duties as such. The testator's personal property amounted to over \$142,000. In his will he gave various legacies, to be paid within three years after his death, and he bequeathed to his executors the sum of \$11,500 in trust, to apply the income of a portion thereof during a minority and of another portion

thereof during a life designated, and at the expiration of the trust he gave the principal sum to persons designated. He empowered his executors to sell all or any of his real estate, and to sell and convert into money, at public or private sale, his personal estate, for the purpose of paying debts and legacies and making distribution among the residuary legatees. He also directed and empowered his executors to sell and dispose of any and all vessels owned by him at his decease, whenever they deemed it for the best interests of his estate, and provided that they should in no manner be held accountable for the loss or depreciation in value of such vessels. The tenth clause of the will, which gave rise to the present controversy, is as follows; "It is my will, and I do hereby order and direct my executors, hereinafter named, to allow my friend, Robert C. Reeves, to retain, as a loan to him out of my personal estate, the sum of \$15,000, being the amount now invested by me in the business carried on and conducted by him, and in which I am a special partner, to be used and employed by him in carrying on and conducting the same business, and to be continued from year to year at the option of the said Robert C. Reeves, but not to exceed the term of three years, upon his paying the interest thereon annually at the rate of five per cent. per annum. Such income, when received by my said executors, to be from time to time paid over to my residuary legatees, and at the expiration of said term, or the sooner determination thereof at his option aforesaid, I direct my said executors to receive from the said Robert C. Reeves the said sum of money and interest, and to discharge him fully from all further liability on account or by reason of such indebtedness, and upon such payment being made to my said executors, the said sum of \$15,000 is to become a part of my residuary estate, and to be distributed according to the provisions of this my will with respect thereto."

In the inventory of the testator's estate, filed by the executors after his decease, his interest in the partnership with Reeves was estimated and appraised at \$14,000.

The plaintiffs, two of the three residuary legatees named in the will, for themselves and the other residuary legatee, com-

menced this action to restrain the executors from making the loan to Reeves mentioned in the tenth clause of the will, without requiring of him security therefor. They alleged in their complaint, among other things, that the executors proposed and intended to make the loan without taking security; that the business in which Reeves was engaged was one peculiarly of great risk, and that he had but little or no property. The defendants in their answer, among other things, denied that the business of Reeves was one peculiarly of great risk, as alleged in the complaint, and they denied that he had little or no property, and alleged that he was and had at all times been solvent and able to pay all his debts.

The court, at Special Term, found, upon the allegations in the complaint and answer above specified, without any proof, that the business in which Reeves was engaged was one of risk—not that it was peculiarly risky, or more risky than other kinds of commercial or mercantile business. He also found that Reeves intended to use the money, if loaned to him, in his business, and that it would thus be at risk, peril and jeopardy, and liable to be lost; that the executors intended to loan him the money, and refused to take any security therefor, although they had been requested to do so by the plaintiffs. And the court ordered judgment for plaintiffs, among other things, that the executors should not loan the \$15,000 to Reeves, or permit him to retain that sum, as provided in the tenth clause of the will, without requiring and obtaining from him sufficient and proper security for the safe payment and return of the sum thus loaned or retained at the end of the three years. The judgment thus ordered was, upon appeal by the defendants, affirmed at the General Term, and then they appealed to this court.

The claim of the plaintiffs, which has thus far been sustained by the Supreme Court, is, that in making this loan, the defendants are in the position of all trustees authorized to loan trust funds, and that they are bound by the general rules of law to take proper security. That rule is supposed to require trustees exercising a general authority to make investments to take government or real estate securities. (*King v. Talbot*, 40

N. Y. 76.) But the creator of a trust requiring the investment of money may designate how the investment may be made, and what security may be taken ; and he may dispense with all security. The question here is, did the testator intend that Reeves should give security for the sum to be retained by or loaned to him ? We think it clear that he did not. He appointed him one of his executors without requiring him to give security, investing him as such with large discretion over a large estate, to be exercised during a long period of time. He evinced entire confidence in his sound judgment, capacity, integrity and solvency. He called him "his friend," knew him well, had for a considerable time been associated with him in business, and was well acquainted with the business in which he was engaged and the risks incident thereto. He had invested in that business \$15,000, and intrusted it to the management of Reeves without, so far as appears, any security. He evidently did not want the business broken up and Reeves and his own estate subjected to the loss which might be caused by closing it up in the ordinary way required by law. He meant also to favor Reeves by giving him the use, during the time mentioned, of the money which he had invested in the business, so that he could continue the business if he desired to. If Reeves were required to give the security exacted, the loan would be no favor to him. He might not be able to give such security ; and if he could, he could borrow the money without difficulty of other lenders. The language used precludes the idea of security. As executor he was required to give no security. The property was then in his hands, and as surviving partner he was required to give no security. He was to be allowed "to retain" the sum named. If the testator had intended that security should be exacted for the loan, that matter would have been in his mind and probably expressed. Here then the testator designated the person to whom the loan should be made and the rate of interest, and under such circumstances and in such language, that we think it was intended that the loan should be without security.

It matters not that the sum thus loaned is put in some jeopardy—subjected to such risks as ordinarily attend the

carrying on of any business or the loaning of money upon merely personal security. The testator contemplated such risks, and was willing his executors should take them. It does not appear that the financial condition of Reeves had changed any since the making of the will. So far as appears, he had the precise responsibility which the testator contemplated when he made his will. The fact that the partnership interest was inventoried after the testator's death at a less sum than it was supposed to be worth on the prior first day of January is not a very significant fact. It does not appear that the appraisals at the two dates were made by the same men or upon the same basis. The fact that the interest was inventoried at \$14,000 is not conclusive that it might not be made to produce more, if settled as contemplated by the testator.

Our decision is based upon the facts as they now appear. The sum to be loaned was for use by Reeves "in carrying on and conducting" his business. He could not claim the loan for any other purpose. If he was actually insolvent, or if for any other reason he was not in a condition to go on with his business, he could not claim the loan.

We are, therefore, of opinion that no case was made justifying the decision rendered herein, and the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except RAPALLO, J., absent.

Judgment reversed.

NICHOLS vs. ALLEN.

[180 Massachusetts, 211.]

INDEFINITE CHARITABLE BEQUESTS.

A will, after several bequests to individuals and to charitable corporations, contained the following clause: "After the payment of the foregoing legacies, and all expenses and charges in the settlement of my estate, should there be any surplus, I give and bequeath the same to my executors and the survivor of them, or their successors, if any such should be appointed to administer on my estate, to be by them distributed to such persons, societies or institutions as they may consider most deserving." By a separate clause two persons were appointed executors. *Held*, that the executors took the bequest in trust; that the trust was not a charitable one, and was too indefinite to be carried into effect; and that the next of kin took by way of resulting trust.

BILL IN EQUITY, alleging that the plaintiff was the first cousin and next of kin of Eliza Powers, whose will, which was duly admitted to probate, after making pecuniary bequests to sundry persons, amounting to \$54,000, and to various charitable corporations, amounting to \$100,000, contained the following clauses:

"After the payment of the foregoing legacies, and all expenses and charges in the settlement of my estate, should there be any surplus, I give and bequeath the same to my executors and the survivor of them, or their successors, if any such should be appointed to administer on my estate, to be by them distributed to such persons, societies or institutions as they may consider most deserving.

"I give to my executors full power to sell any real estate of which I may die seized, and convey the same by good and sufficient deeds to the purchasers.

"I hereby nominate and appoint Isaac S. Croft and Charles Allen, both of said Boston, as the executors of this my last will; and I direct that they shall not be required to give sureties on their official bonds."

The bill further alleged that the defendants, the persons named in the will as executors, were appointed as such by the Probate Court, and accepted the trust; that, after paying the

legacies and the charges and expenses of administration, there remained in the hands of the executors the sum of \$68,300, which the executors claimed the right to distribute to such persons, societies or institutions as they considered most deserving; whereas, as the bill charged, the will was invalid, and void for uncertainty; and that the plaintiff was entitled to the residue as next of kin.

The prayer of the bill was that the trust be declared void, and the defendants ordered to pay said surplus to the plaintiff, and for further relief.

The defendants demurred for want of equity. The case was heard by Gray, C. J., on the bill and demurrer, and, at the request of both parties, reserved for the determination of the full court.

The case was argued at the bar, and further arguments were afterwards submitted in writing by leave of the court.

• *W. G. Russell & G. Putnam*, for the defendants.

A. A. Ranney, for the plaintiff.

GRAY, C. J. Two general rules are well settled: 1st. When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives, or to the testator's residuary legatees or next of kin. *Briggs v. Penny*, 3 De G. & Sm. 525, and 3 Macn. & Gord. 546; *Thayer v. Wellington*, 9 Allen, 283; *Sheedy v. Roach*, 124 Mass. 472. 2d. A trust which by its terms may be applied to objects which are not charitable in the legal sense, and to persons not defined, by name or by class, is too indefinite to be carried out. *Morice v. Bishop of Durham*, 9 Ves. 399, and 10 Ves. 521; *James v. Allen*, 3 Meriv. 17; *Chamberlain v. Stearns*, 111 Mass. 267. The cases illustrating the application of these rules, referred to in the able and elaborate arguments of counsel, are so numerous, and each case depends so much upon the wording of the

particular instrument, that we shall mention those cases only which were most relied on. But it will be convenient first to examine the bequest before us.

The terms of this bequest clearly manifest the intention of the testatrix to create a trust. The bequest contains no words tending to show that the executors are to take the property, or any part of it, absolutely or for their own benefit; and by our law no such intention is to be implied. *Hays v. Jackson*, 6 Mass. 149, 152, 153; *Winship v. Bass*, 12 Mass. 198, 204; *Nickerson v. Bowly*, 8 Met. 424, 431; Story's Eq. Jur. § 1208. The bequest is not to the executors by name, but is to them and the survivor of them, and to their successors in the administration of the estate. All the property given to them is "to be by them distributed;" the direction to distribute is as broad as the gift. The property is "not to be disposed of" at the unqualified discretion of the executors, but is "to be distributed" according to their judgment of the deserts of the beneficiaries. The objects of the bounty of the testatrix are not otherwise designated than as "such persons, societies or institutions as they may consider most deserving." And there is no indication of an intention that the executors shall not be held legally accountable for a proper execution of the trust.

The strongest case in favor of the defendants is *Gibbs v. Rumsey*, 2 V. & B. 294, in which a bequest to the executors named in the will, "to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion shall think proper and expedient," was held by Sir William Grant to give the executors a purely arbitrary power of disposition, and consequently a beneficial interest. That case differs from the present one in at least three important particulars: 1st. The bequest was only to the executors named. 2d. Much stress was laid on the fact that the words "in trust" had been used in many other places in the will, and were omitted in this clause. 3d. An authority to those, to whom the legal title is given, "to dispose of" the property "in such manner and in such sums and to such persons as they may think proper," is more inconsistent with an arbitrary power of disposition than

is a direction "to distribute" the property "to such persons, societies or institutions as they may think most deserving." And the decision in *Gibbs v. Rumsey* has always been treated by the English courts as not to be extended beyond its special circumstances.

In *Ralston v. Telfair*, 2 Dev. Eq. 255, also, the bequest to executors, which was held by the Supreme Court of North Carolina to be for their own use, was in the less restricted form "to be disposed of as my executors think proper." In the subsequent case of *Green v. Collins*, 6 Ired. 139, the same court held that a residuary bequest to the testator's wife, "to be divided among my children as she thinks proper," created a plain trust for the benefit of the children.

Two cases resembling *Gibbs v. Rumsey* much more nearly than the present case does, were decided by Sir John Leach. One was of a residuary bequest to executors in trust, in default of further directions of the testator, to pay and apply the same to any lawful charitable public purposes, or to any person or persons, and in such shares and proportions, sort, manner and form, as they in their discretion should think fit. *Vesey v. Jamson*, 1 Sim. & Stu. 63. The other was of a residuary bequest to executors "upon trust to dispose of the same at such times and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion." *Fowler v. Garlike*, 1 Russ. & Myl. 232. Each was held to be a plain gift in trust, and therefore not to the executors for their own benefit; but too uncertain for the court to execute, and therefore a resulting trust to the next of kin.

So where a testator gave a fund to his executors upon certain trusts, and declared it to be his will that in the event of the failure of these trusts (which actually happened) his said trustees and the survivor of them, his executors or administrators, should apply the same "to and for such charitable and other purposes as they shall think fit, without being accountable to any person or persons whomsoever for such their disposition thereof," Lord Chancellor Cottenham held that this was a gift in trust, but too uncertain to be carried into effect. He dis-

tinguished the case from *Gibbs v. Rumsey*, and approved the decision in *Fowler v. Garlike*, and made these observations, which are quite applicable to the case before us: "If the fund were intended for the executors' own benefit, the testator might have left with them the option of disposing of it; but they are to pay and apply it for certain purposes mentioned in the will. Then, again, the direction to the executors to pay and apply the fund to such charitable or other purposes as they should think fit, is very inconsistent with the notion that they were to be absolutely entitled to it." *Ellis v. Selby*, 1 Myl. & Cr. 286, 296.

The omission of the words "in trust" is unimportant where, as in the case before us, an intention is clearly manifested that the whole property shall be applied by the legatees for the benefit of others than themselves.

Thus where a sum of money was given to a niece of the testator, "for the express purpose of enabling her to present to either branch of my family any portion of the interest or principal thereon as she may consider the most prudent, and in the event of her death I empower her to dispose of the same by will or deed to those or either branch of her family she may consider most deserving thereof," it was held by Lord Langdale, M. R., and by Lord Cottenham on appeal, that the gift was in trust, but that, the trust being too indefinite to be executed, the sum was part of the donor's general estate. *Stubbs v. Sargon*, 2 Keen, 255, and 3 Myl. & Cr. 507.

A like decision was made in *Buckle v. Bristow*, 10 Jur. (N. S.) 1095, where a testator, after giving bequests and legacies to several charitable institutions by name, gave the residue of his property upon trust for his executors to hold the same for such uses and purposes as he might by codicil or deed direct or appoint, and, in default thereof, then for the same to be expended and appropriated within three years in such way and amounts and for such purposes as they might in their judgment and discretion agree upon. Vice-Chancellor Wood (afterwards Lord Chancellor Hatherley said that, even if the words "in trust" had been omitted, and the word "appropriated" had been used alone, without the word "expended," the result

must have been the same; and that the decision in *Gibbs v. Rumsey* went "to the very outside of the doctrine," and "no case would be decided according to it, where the gift is not precisely and distinctly in the words there mentioned." See also *Yeap Chear Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381, 389, 390.

In *McCormick v. Grogan*, L. R. 4 H. L. 82, the devise was absolute and unqualified of the testator's whole property to the defendant, whom he described as "my most sincere and valued friend," and appointed sole executor; and the instrument relied on as creating a trust was a letter addressed to the defendant, in which the testator expressed his intentions that certain persons should receive certain sums of money, but, besides otherwise signifying that he left it to the defendant to carry out the intentions as he might think best, said, "I do not wish you to act strictly to the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would if living, and as the parties are deserving; and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties should you not act in strict accordance with it." Such was the case of which Lord Hatherley (adopting the words of Lord Justice Christian in the court below) said that, if it were possible to look into the thoughts of the testator when he was inditing the will and letter, he was "persuaded that what we should find there would be a purpose to this effect, to set up after his decease, not an executor or a trustee, but as it were a second self, whom, while he communicates to him confidentially his ideas as to the distribution of his property, he desires to invest with all his own irresponsibility in carrying them into effect." L. R. 4 H. L. 95.

In *Meredith v. Heneage*, 1 Sim. 542, a devise of a testator's estate to his wife "unfettered and unlimited, in full confidence and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference," was held by the

House of Lords, upon the advice of Lord Eldon and Lord Redesdale, not to create a trust, because the words "unfettered and unlimited" preclude the inference of such an intention.

In *Lambe v. Eames*, L. R. 10 Eq. 267, and L. R. 6 Ch. 597, the bequest was to the testator's wife, "to be at her disposal in any way she may think best for the benefit of herself and family." And several of the other cases cited at the bar were of unsuccessful attempts to impose a trust, by reason of mere precatory words, upon property bequeathed to a wife or child absolutely and without restriction. *Sale v. Moore*, 1 Sim. 534; *Reid v. Atkinson*, Ir. R. 5 Eq. 373; *in re Bond*, 4 Ch. D. 238; *Spooner v. Lovejoy*, 108 Mass. 529; *Hass v. Singler*, 114 Mass. 56; *Sears v. Cunningham*, 122 Mass. 538.

In *Stead v. Mellor*, 5 Ch. D. 225, the testatrix gave her personal estate to her executors upon trust to convert into money, and, after payment of expenses, debts and legacies, to hold the residue in trust for such of two nieces of hers as should be living at her death, "my desire being that they shall distribute such residue as they think will be most agreeable to my wishes;" and Sir George Jessel, M. R., held that the nieces took the residue for their own benefit. To have held otherwise would have been to engraft a trust upon a trust, in a case in which, as the Master of the Rolls observed, the testatrix had used the words "in trust" in the gift to the executors only, and beyond that had merely expressed a desire that the nieces should distribute the residue, not "in accordance with my views and wishes," or "as they know will be most agreeable to my wishes," but "as they think will be most agreeable to my wishes."

The decision in *Wells v. Doane*, 3 Gray, 201, turned upon the peculiar provisions of the will. The testatrix, after devising and bequeathing the residue of her estate "to my nephew Seth Wells," for life, and at his death to such charities as should be deemed most useful by his executor or administrator, added, "And it is my will and intention that the said Seth Wells may dispose of the furniture, plate, pictures and all other articles now in my house, absolutely, as he may deem expedient, in accordance with my wishes as otherwise com-

municated by me to him." Taking the two clauses together, the court concluded that they had the same meaning as if the will read thus: "I give all the residue of my property, except the articles in my house, to Seth Wells for life, and I authorize him to dispose of those articles absolutely, as he may deem expedient." It is to be observed that the bequest was to the nephew by name, and not as executor, although he was appointed executor in another part of the will.

The decision in *Wells v. Hawes*, 122 Mass. 97, has no bearing upon this case. There the real estate was devised absolutely to the person named in the will as executor, subject to no trust except so far as a trust might be held to be created by a power given in the will to sell the land if necessary to carry out the purposes of a memorandum left with him by the testatrix; and the only point decided or argued was that, there being no evidence either of such memorandum or of such necessity, a conveyance by him without license from the judge of probate afforded no defense to a real action brought by a creditor of his who had attached and levied upon the land.

Upon a review of the authorities, we find nothing in them to control the conclusion, based upon the intention which appears to us to be clearly manifested on the face of this will, that the executors take the estate, not beneficially, but in trust; and that, the beneficiaries not being described by name or by class, the trust cannot be upheld unless its purposes are such as the law deems charitable.

The trust declared cannot be sustained as a charity. There is no restriction as to the objects of the trust, except that they must be "such persons, societies or institutions as they" (the trustees) "may consider most deserving." "Deserving" denotes worth or merit, without regard to condition or circumstances, and is in no sense of the word limited to persons in need of assistance, or to objects which come within the class of charitable uses.

A bequest for the relief of "deserving poor," or of "indigent but deserving" individuals, is a charitable bequest, not by force of the word "deserving," but in virtue of the word "poor" or "indigent," and would be equally charitable if the

word "deserving" had been omitted. *Kendall v. Granger*, 5 Beav. 300, 303. So a bequest "for the education of deserving youths" is charitable, because it is for the promotion of education and learning. *Saltonstall v. Sanders*, 11 Allen, 446, 454. And, possibly, a bequest for "deserving literary men" might be held upon like grounds to be a charity. *Thompson v. Thompson*, 1 Coll. 381, 399.

Bequests for poor relations have been held to be charitable bequests. Boyle on Charities, 31-36, and cases cited; *Gillam v. Taylor*, L. R. 16 Eq. 581; *Attorney General v. Northumberland*, 7 Ch. D. 745. But for "such relations" of the testator as are "most deserving" (without "poor" or any equivalent word) is not a charitable use; and includes all relations of the testator within a certain degree, because, as was observed by Sir Joseph Jekyll, M. R., a Court of Chancery has "no rule of judging of the merits of the testator's relations." *Doyley v. Attorney General*, 4 Vin. Ab. Charitable Uses, C, pl. 16; s. o. 2 Eq. Cas. Ab. 194, pl. 15; 7 Ves. 58, note; *Harding v. Glyn*, 1 Atk. 469; *Burrough v. Philcox*, 5 Myl. & Cr. 72, 91, 93; *Salisbury v. Denton*, 3 K. & J. 529, 538.

There is a recent English case singularly in point. A testator by his will directed his trustees to pay the following legacies: "To the Cancer Hospital, £100; to the Brompton Hospital for Diseases of the Chest, £100; to the Lord Mayor of Dublin for the time being, £100 for such subjects as he shall deem most deserving; to the Blind Asylum, New Kent Road, £100; to Mrs. Gladstone of No. 11 Carlton House Terrace, to be applied as she thinks proper in charity, £200; and the residue of my estate I bequeath to my trustees for such objects as they consider deserving, whether in increase of the before-mentioned ones or otherwise." Vice-Chancellor Wickens, a most accomplished equity judge, held that the bequest to the Mayor of Dublin and the residuary gift could not be held to be limited to charitable objects, but failed altogether, on the ground of uncertainty. *Harris v. Du Pasquier*, 26 L. T. (N. S.) 689; s. c. 20 Weekly Rep. 668.

The other cases cited by the learned counsel for the defendants have no tendency to support this as a charitable bequest.

The case of *Offley's Charity*, described generally in 1 Cal. Pro. Ch. 216, and in Dwight's *Charity Cases*, 185, as of legacies "for the benefit of apprentices and other inhabitants of the city of Chester," appears by the 31st Report of the Commissioners of Charities, 385, referred to by Mr. Dwight, to have been of money to be lent from time to time "to twenty-four young men free of the said city of Chester, of honest name and fame, occupied and inhabitants within the said city," twelve of whom to be "such as had served in that city for their freedom as apprentices," and the income derived from such loans to be devoted to poor persons and prisoners in that city; and thus within the very words of the St. of 43 Eliz. c. 4, § 1, "for supportation, aid and help of young tradesmen and handicraftsmen," and for relief of "poor people" and of "prisoners." Duke on Charitable Uses (Bridgm. ed.), 1, 131. *Attorney General v. Ironmongers' Co.* Coop. Pract. Cas. 283; *Odell v. Odell*, 10 Allen, 1, 12; *Jackson v. Phillips*, 14 Allen, 539, 569, 570; *in re Prison Charities*, L. R. 16 Eq. 129.

In *West v. Knight*, 1 Ch. Cas. 134, in 1669, a bequest to a parish was objected to because it did not say to what use, "whether it were for the poor, or for repair of the church, or highways, &c.," and was upheld by Sir Hardbottle Grimstone, M. R., and applied for the benefit of the poor of the parish. But that would seem to have been an application in the discretion of the court to one of several uses, all of which were charitable, in accordance with the rule laid down in an earlier case, published in Tothill twenty years before, that when no use is mentioned it shall be decreed to the use of the poor. *Fisher v. Hill*, Toth. 95, (2d ed.) 33; s. c. Duke, 484. And a bequest "for the use and benefit of said parish" has always been held in England to be a good charitable bequest. *Attorney General v. Hotham*, Turn. & Russ. 209; *Attorney General v. Webster*, L. R. 20 Eq. 483.

A gift to widows and orphans" of a particular sect or parish, or to "widows and children of seamen" of a town, is good, because the words clearly manifest an intention to relieve a class of persons under a common need of assistance, and coming within the spirit, if not within the letter, of the statute of

Elizabeth, "relief of aged, impotent and poor people," "maintenance of sick and maimed soldiers and mariners," and "education and preferment of orphans." *Cook v. Duckenfield*, 2 Atk. 563; *Powell v. Attorney General*, 3 Meriv. 48; *Attorney General v. Comber*, 2 Sim. & Stu. 93; and in *Rogers v. Thomas*, 2 Keen, 8, in which Lord Langdale sustained a bequest "to the inhabitants of Tawleaven Row in the parish of Sethney," it had been found by a master that the row consisted of seven houses which were entirely occupied by poor fishermen and laborers and their families.

In *Cook v. Duckenfield*, 2 Atk. 563, in *Paice v. Archbishop of Canterbury*, 14 Ves. 364, and in *Pocock v. Attorney General*, 3 Ch. D. 342, the testator plainly manifested his intention to devote his property to charitable uses; in the first case by the words, "for such charitable uses and purposes as I shall direct by codicil or otherwise;" in the second case, by the words, "all the remainders of my different bequests I give and bequeath in trust for charitable purposes;" and in the third case, by the words, "to such charitable institutions as I shall by any future codicil give the same;" and each case was decided upon that ground. 2 Atk. 569; 14 Ves. 371; 3 Ch. D. 346, 350; *Saltonstall v. Sanders*, 11 Allen, 458, 462.

A gift to charitable or public purposes is good. *Dolan v. Maodermot*, L. R. 3 Ch. 576. But if the trustees are authorized to apply or distribute it to other purposes or persons, it is void. *Chamberlain v. Stearns*, *Vezey v. Jamson*, and *Ellis v. Selby*, before cited.

The conclusion of the whole matter is, that, the testatrix having given the residue of her property to her executors in trust, and not having defined the trust sufficiently to enable the court to execute it, the plaintiff, being her next of kin, is entitled to the residue by way of resulting trust.

Demurrer overruled.

See *Olliffe v. Wells*, *infra*; *Simpson v. Welcome*, *ante*, page 248; *Piper v. Moulton*, *infra*.

PIATT *vs.* SINTON.

[37 Ohio State, 353.]

DEVISE OF ALL TESTATOR'S PROPERTY IS A FEE.

A devise by a testator of *all* of his property, of every description, whether real, personal or mixed, after paying all his just debts, is a devise of the fee, without the aid of a statute declaring such to be the effect of the devise.

Where there is a devise in fee, with a provision in the will that in case the devisee should die without leaving any legitimate heirs of her body, then the estate should go over to persons named, the fee taken by the first devisee is determinable only on the contingency of her dying without leaving such heirs living at the time of her death.

ERROR to the Superior Court of Cincinnati.

The plaintiff in error, Lucinda Francis Piatt, who was the plaintiff below, is the devisee of William Piatt, whose will bears date, March 2, 1832, and was admitted to probate in 1834. The testator was the owner in fee simple of the land in controversy.

The dispositive provisions of the will are as follows:

"I will and bequeath to Lucinda Francis Piatt, now at the school of Mrs. Ryland, in this place, all of my property of every description, whether real, personal or mixed, after paying all my just debts; excepting, however, such other bequests as are hereinafter named, viz.: To my nephew, Daniel S. Piatt, son of my deceased brother, Daniel Piatt, my fowling piece, which was presented to me by Colonel Riano, of the Spanish Royal Army; then to my nephew, William Piatt, son of my deceased brother, Daniel Piatt, I will and bequeath my sword and pistols, being the same which I used at the siege of New Orleans; these I wish to have retained in the family, if possible; my wearing apparel I will and bequeath to E. Demond Piatt, William Piatt, and Daniel S. Piatt, sons of my deceased brother, Daniel Piatt, to be equally divided between them; and in case the aforesaid Lucinda Francis Piatt should die without leaving any legitimate heirs of her body, then I will and bequeath all my property, of every description, such as would be granted to her by this will, unto Catharine Wheeler, E.

Demond Piatt, William Piatt, and Daniel S. Piatt, children and heirs of my deceased brother, Daniel Piatt, to be equally divided."

In July, 1844, the plaintiff uniting with her husband conveyed, for the consideration of \$3,100, a parcel of the real estate devised to her, to John C. Wright, by a deed in fee simple, with full covenants of warranty.

In 1866, the widow and heirs of Wright, by like deed conveyed the same premises to the defendant, David Sinton.

It is charged in the petition, in substance, that the plaintiff only in fact sold an estate for and during her life in the premises; and that the deed in fee simple was executed by mistake and in ignorance of her rights. It is also charged that Sinton purchased with notice of her rights. The plaintiff also claims that she took by the devise only an estate during her natural life.

The court below found, "that Lucinda Francis Piatt took a fee in the real estate described in the petition, under and by the will of her testator, William Piatt, subject to be defeated only by her dying without leaving legitimate heirs of her body."

And the court found the other issues joined for the defendants; and rendered judgment accordingly.

On error, the Superior Court in General Term affirmed the judgment; and the present petition in error is prosecuted in this court to reverse these judgments.

Taylor & Hollister, for plaintiff in error.

J. F. Baldwin, for defendant in error.

WHITE, J. We find no error in this case. The construction of the will now in controversy is governed by the decision in *Niles v. Gray*, 12 Ohio St. 320. That case was decided in 1861, and has become a rule of property in this State, and we are not now disposed to reconsider it.

The will in that case, as well as the will now in question, was made prior to the passage of the act of March 3, 1834

(1 Curwen, 145), which declared, in effect, that a devise of lands, in a will thereafter made, should be construed to convey a fee simple, and that the devisee should take all the estate which the devisor had in the property, unless it appeared by express words or the manifest intent that a lesser estate was intended. The decision, therefore, in *Niles v. Gray*, was not founded upon that statute nor upon any subsequent one of like effect; but upon the terms of the will as construed without the aid of such legislation. The language in that case that was held to operate as a devise of the fee was "the remaining part of my real property." The language of the devise in the present case is "all of my property of every description, whether real, personal or mixed, after paying all of my just debts;" and the devise over to the children and heirs of his deceased brother is of the same interest and estate that was given by the will to Lucinda, the first devisee.

The claim on behalf of Lucinda is that she took only a life estate. But it seems to us, that she took all the estate and interest that was subject to disposition by the testator, and that was liable for the payment of his debts, subject to be defeated on the happening of the contingency named in the will, when the estate is to go over to the persons named as the children and heirs of his deceased brother.

The contingency upon which the devise over takes effect, according to *Niles v. Gray*, is the death of the first devisee, Lucinda, without leaving legitimate heirs of her body, or lineal descendants then living; and that until such contingency happens the fee is vested in the first devisee and her grantees.

Whether the devise over will ever take effect cannot be determined until the plaintiff's death: but if it should never take effect, her grantee, Sinton, will, according to the principles decided in *Niles v. Gray*, hold an indefeasible estate, if the deed to him is valid.

That the deed is valid was found by the court below upon the evidence; and we see nothing in the record to warrant us in disturbing that finding.

Judgment affirmed.

BYRNES vs. BAER.

[86 New York, 210.]

AFTER-ACQUIRED REAL ESTATE.—EVIDENCE OF INTENT TO PASS UNDER STATUTE.

Under a statute declaring that every will which in express terms devises or in other terms denotes an intent to devise all the testator's real estate, "shall be construed to pass all the real estate which he was entitled to devise at the time of his death," such a will operates upon lands acquired after the making of the will.

In the absence of express words to bring a devise within the statute, the intention must be found in the words of the will; it cannot be inferred from extrinsic facts; the words, however, as in case of other instruments, may be interpreted in the light of the surrounding circumstances.

Where a testator gives in general terms the residue of his estate or property, and there is both real and personal property upon which the will may operate, the testator does thereby manifest an intention to devise all of his residuary real estate, unless a more limited purpose is to be gathered from other clauses of the will.

A devise of the proceeds of lands directed to be sold by the executors is a devise of the land within the statute, although the naked title remains in heirs until a sale.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, in favor of defendant, entered upon an order made April 7, 1880, on a case submitted under sections 1279 and 1281 of the Code of Civil Procedure.

Plaintiff contracted to sell to defendants certain lands; the latter refused to complete the purchase because of alleged defect of title.

The facts submitted were substantially these: In 1867 Joseph Jacobs died seized of the lands in question, leaving a will executed in 1857, which, after providing for the payment of his debts, &c., contained the following clauses:

"*Secondly*.—I give, devise and bequeath to my well-beloved wife all my household and kitchen furniture, jewelry, plate, watches, wines, liquors, stores, wearing apparel, beds, bedding and linen, and all other articles in our usual use in our household, and further, the use of the dwelling-house or the rents, issues and profits thereof, during her life.

"*Thirdly*.—All the rest, residue and remainder of my estate I direct my executors to invest and keep invested in bond and mortgage on property in the city of New York, Brooklyn or Williamsburgh and the net income derived therefrom I direct them to divide in two equal parts, and pay the one-half of such income to my said beloved wife, and the other half to my well-beloved daughter, Bertha R., during their joint natural lives, and upon the death of either the remaining half of the income to the survivor, unless my daughter have issue, in which event the same shall go to such issue, and upon the death of both, the principal sum shall vest in children of my daughter, if she leave any, or if she die without issue, then the same shall vest in my brothers' and sisters' children equally."

The testator acquired the lands in question after the execution of the will; he left his daughter, said Bertha R., his only heir-at-law, who, claiming that her father died intestate as to said lands, conveyed them by warranty deed, and plaintiff claimed under said deed through various meane conveyances.

Wm. Henry Arnoux, for appellant.

A. C. Anderson, for respondents.

ANDREWS, J. The Revised Statutes (2 R. S. 57, § 5) declare that "every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." This enactment changed the rule which theretofore existed, that a devise could not operate upon lands acquired by a testator after the making of the will without a re-publication, however clearly such intent was expressed in the testamentary instrument. In *Butler's Case* (3 Co. 30), this doctrine was based upon a construction of the Statutes, 32 and 34 Hen. VIII, which empowered persons "having lands," etc., to devise; and it was held that only such lands as the testator had at the time of making the will, were within the purview of those statutes. It is stated by Parker, Ch. J., in *Ballard*

v. *Carter* (5 Pick. 112), that the rule is founded on the interest which the law always takes in heirs. But, whatever may have been the reason for the rule, it was thoroughly settled.

It cannot be doubted, however, that the rule, in many cases, defeated the intention of testators. A testator understands that his will takes effect only upon his death, and where he in terms devises all his real property, the natural inference is that he refers to all the real estate he shall then own. Unless specially instructed, he would not understand that a different rule applied to real, from that applied to personal property, or that a republication would be necessary to pass after-acquired property of one kind and not of the other. The section referred to has abrogated the rule of the common law, and it enacts a new rule of construction, viz., that words of general devise shall be construed to pass all the real estate which the testator was entitled to devise at his death. It is clear that, to bring a devise within the statute, the testator must make known, by words in his will, his intent to devise all his real estate. His intention cannot be inferred from extrinsic facts. The statute requires that the intention shall be shown by the will. The words used may be interpreted, as in the case of other written instruments, in the light of surrounding circumstances; but the intention must, after all, be found in the words of the will. Where the will in terms devises all the testator's real estate, without limitation, there is no room for construction. The statute makes the devise to speak as of the time of the testator's death, and all his real estate, which he then owns, and could devise, is comprehended in the disposition. But the statute may operate, although there be no devise in express terms, of all the testator's real estate. The alternative language is, "or in any other terms denoting his intent to devise all his real property." The construction of this alternative clause is not free from difficulty. It seems clear, that the legislature contemplated a case where the intent of the testator to devise all his real property might be indicated, in the absence of the specific descriptive terms most usually employed. It would not seem to be necessary, in order to give effect to the alternative provision, that the "other terms" used should

point specifically to the death of the testator, because all the statute requires in either case is, that the will should show, by words *de presenti*, an intention to devise all the testator's real property. If this is shown, then the statute makes the will speak as of the time of his death. The alternative provision is, we think, satisfied, by the use by the testator of words which, by construction of law and by usage, comprehend real property, although not exclusively applicable thereto. It has now become an accepted canon of construction of wills, that general words are to be taken to comprehend a subject which falls within their usual sense, unless there is, as said by Lord Eldon, in *Church v. Mundy* (15 Ves. 396), "something like a declaration plain to the contrary." In accordance with this rule it is now held (although contrary to some of the earlier cases), that the words "estate," "property," etc., used in a residuary clause, are understood in their ordinary sense, and operate upon both real and personal estate, even when terms are afterward used in reference to the devise, more properly applicable to personal property. (*Saumarez v. Saumarez*, 4 My. & Cr. 331; *Mayor of Hamilton v. Hodsdor*, 6 Moore's P. C. C. 76; *Jackson v. Housel*, 17 J. R. 281; 1 Jarm. on Wills, 721.) The general sense of particular words may be restrained by the context, indicating that they were used in a limited sense or as designating only one species of property, but, in the absence of such indication, the testator must be presumed to have used them in the usual and larger sense, and effect is given to them accordingly. Where, since the statute, a testator gives in general terms the residue of his estate or property, and there is both real and personal property upon which the will may operate, the testator thereby manifests an intention to devise all his real estate, unless a more limited purpose is to be gathered from the other parts or clauses of the will. We need not decide in this case what construction would be given to general words, where the testator owned no real estate when the will was made. But where a man makes a will, the fair presumption is that he intends to dispose of all his property; and if he gives all the residue of his estate, it fairly means that he gives all his property, real or personal, not otherwise disposed of. The

Massachusetts statute provides that all after-acquired interests in real estate shall pass by the will, whenever "such clearly and manifestly appears by the will to have been the intention of the testator;" and in *Cushing v. Aylwin* (12 Metc. 169), where a testatrix, who at the time owned no real estate, made her will disposing of "all my property," in trust to certain trustees, their executors, etc., it was held that her intention to dispose of all the real estate she owned at the time of her death, manifestly appeared, and consequently that real estate acquired by her after the making of the will, passed thereby. (See, also, *Loveren v. Lamprey*, 22 N. H. 434.)

It only remains to apply to the will now in question, the rules of construction to which we have adverted. The first clause is immaterial to the present inquiry. The second, and third clauses, are as follows: "*Secondly*. I give, devise and bequeath to my well-beloved wife, all my household furniture * * * and all other articles in our usual use in our household, and further, the use of *my dwelling-house*, or the rents, issues and profits thereof, during her life. *Thirdly*. All the rest, residue and remainder of my estate, I direct my executors to invest and keep invested in bond and mortgage, on property in the city of New York, Brooklyn, or Williamsburgh, and the net income derived therefrom, I direct them to divide into two equal parts, and pay the one-half of such income to my said beloved wife, and the other half to my well-beloved daughter, Bertha R., during their joint natural lives, and upon the death of either, the remaining half of the income to the survivor, unless my daughter have issue, in which event the same shall go to such issue, and upon the death of both, the principal sum shall vest in children of my daughter, if she leave any, or if she die without issue, then the same shall vest in my brothers' and sisters' children equally." The testator, as is inferable from the will, owned, at the time the will was made, a dwelling-house. He subsequently acquired the land now in controversy, and the question is whether this subsequently-acquired land passed under the third clause of the will.

By the second clause the testator devised to his wife a life

estate in the dwelling-house. He died intestate as to the remainder, unless it passed under the third clause, and the statute has no application unless the remainder passed under the devise, or unless the legal title descended to the heir, subject to a power of sale vested in the executors, and the income and proceeds were subject to the disposition of that clause, for then he would not have devised in express terms or by implication all his real estate. Although the statute speaks of a devise of all the real estate, as the evidence of an intention to pass subsequently-acquired land, we are of opinion that a devise of the proceeds of lands directed to be sold, although it may leave the naked title in the heir, until a sale, is a devise of the land within the statute. If the direction applies to all the real estate of the testator, it unmistakably exhibits his intention to make a complete beneficial disposition of his whole property, and brings the case within the equity of the statute. We think the executors in this case, took either the legal title in remainder to the dwelling-house, in trust for the purposes specified in the third clause, or were vested with a power of sale, to be exercised in behalf of the persons mentioned therein. It is unnecessary to determine which is the true construction, although we are inclined to the opinion that the legal title in trust was vested by implication of law in the executors. (*Brewster v. Striker*, 2 Comst. 19; *Leggett v. Perkins*, id. 297; *Vail v. Vail*, 4 Pai. 317.) It is true that there are no express words of devise in the third clause, but this is not essential. (*O'Toole v. Browne*, 3 E. & B. 572.) The gift is of all the rest, residue and remainder of "my estate;" and these words, by well-settled construction, unless qualified by other parts of the will, comprehend the remainder in the dwelling-house not devised in the second clause, and all other real estate owned by the testator at the making of the will. It is claimed that the direction to the executors to invest and keep invested, etc., implies that the subject of the gift in the third clause was money in hand, or personal property, and not land. It is true that these are somewhat inapt words to apply to land. If so applied they presuppose a sale of the land, and an investment of the proceeds of the sale. But a direction to invest prop-

erty, consisting of both real and personal estate in bond and mortgage, may be carried out by a sale of the land, and fairly implies a power of sale for conversion, in the person to whom the direction is given. It is further insisted, that it is unreasonable to suppose that the testator intended, after giving a life estate in the house to his wife, to give her, in addition, one-half of the income from the proceeds of its sale. But the power of sale vested by implication in the executors, relates to the remainder only. The intent of the testator apparently was, to secure a house for his wife for life, and beyond this to give her one-half of the income of his property, including any income which might arise from the proceeds of the sale of the remainder in the dwelling-house. The case of *Saumarez v. Saumarez* is much like this, in some of its essential features. There, the testator gave to his son Richard (who was heir) his freehold lands, without words of inheritance, and directed that the residue of the property he should leave at his death, be divided between Richard and his two sisters, in equal proportions, and that the portion of the son should be placed in the name of trustees, and the interest paid to him during his life, and after his death his share to go to his children, with power to the trustees to employ the interest for their maintenance, and a portion of the capital for their advancement. It was claimed that the remainder in the freehold lands did not pass under the residuary clause, but descended to Richard as heir; and this argument was sought to be enforced by the consideration that the residuary clause referred to personal estate, and that this was indicated by the words "interest," "capital," "portion," etc. But the point was overruled, and it was held that the remainder passed, and the court refused to restrain the effect of the words "residue of my property," because the subject of the gift was subsequently referred to in terms, which more appropriately described personal property.

The case before us is not free from difficulty. The rule that an heir is not to be disinherited without clear evidence of intention is of less force here than in England, where it originated, because the policy upon which it was founded has not been incorporated into our system. But, as in all cases of testa-

mentary construction, the question is one of intention, to be gathered from the will. The general words, "rest, residue and remainder of my estate," clearly comprehend real estate, and show an intention to pass all the estate, real and personal, of the testator, not before disposed of, and are not, we think, restrained or limited by the doubtful indications deduced from the subsequent language.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

Devise including after-acquired property.—In almost every State in the Union there is a statute on the subject of after-acquired real estate, and its disposition by will, similar, in essential particulars, to the New York Statute of 1890.

The New York Statute reads:—"Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." 3 N. Y. R. S. (6th ed.), 58, § 7; 3 N. Y. R. S. (7th ed.), p. 2284, § 5.

This is in derogation of the common law rule. A similar statutory provision went into effect in England, in 1838. 1 Vict. c. 26, § 24.

The common law rule, as in force in New York, prior to 1890, is laid down, and English cases cited, in *Rogers v. Potter*, 9 Johns. 312, and in *Van Kleeck v. The Dutch Church*, 20 Wend. 457. See, also, *Van Alstyne v. Spraker*, 13 Wend. 582, and *Van Cortlandt v. Kip*, 1 Hill, 590.

In *McNaughton v. McNaughton*, 41 Barb. 50, it is held that where a testator devises all his real estate in express and unambiguous words, he must be decreed to have reference to his estate as it shall exist at the time of his death. He shall be presumed to know the law, and his plain words are to have their reasonable legal signification; a. c. 34 N. Y. 201.

In the case of *Lynes v. Townsend*, 33 N. Y. 558, it is held by Denio, J., that in the absence of unlimited terms in the will, there must be a sufficient expression, in adequate language, to enable the court to see that the testator intended to operate upon his subsequently purchased real estate. See, as to the same point, *Youngs v. Youngs*, 45 N. Y. 254; *Lent v. Lent*, 24 Hun, 498.

A will executed before the Revised Statutes of 1890 were passed, devising all the testator's real estate, though the testator died after the statutes took effect, disposes only of such real estate as the testator had at the time of the execution of the will; subsequently acquired lands, therefore, do not pass by it. *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Parker v. Bogardus*, 5 N. Y. 309; *Ellison v. Miller*, 11 Barb. 332; *Green v. Dikeman*, 18 Id. 538.

In *Pond v. Bergh*, 10 Paige, 140, and in *Havens v. Havens*, 1 Sandf. Ch.

324, the will, though executed after 1890, was construed not to affect real estate acquired subsequently.

In *Quinn v. Hardenbrook*, 54 N. Y. 88, the word "now" as against the heirs is construed to refer to the date of the will, and not to the time of the testator's death.

See, also, *Blaisdell v. Hight*, 1 Am. Prob. R. 811; *Kimball v. Ellison*, Id. 533.

EVANS vs. HARDY.

[76 Indiana, 527.]

RECEIPT OF RENTS BY ADMINISTRATOR.—HIS LIABILITY THEREFOR.

Rents which accrue from the real estate of an intestate, after his death, go to his heirs, and not to his administrator.

The receipt by an administrator, except when otherwise specially provided, of the rents, issues and profits of the real estate of an intestate, accruing after his death, makes the administrator the trustee of the heirs and not of the creditors of the estate, but the application of such rents, etc., to the payment of his decedent's debts does not create any claim against the estate in favor of the heirs, but is a conversion of the money in his hands, belonging to the heirs, for which he is personally liable.

FROM the Spencer Circuit Court.

C. L. Wedding, for appellants.

G. L. Reinhard, T. F. DeBruler and *W. H. Thomas*, for appellee.

NIBLACK, J. This was a proceeding, based upon a claim filed against the estate of Robert Graham, deceased, by Mollie Evans, James Graham and John W. Graham, children and only heirs at law of the decedent.

The complaint represented to the court that the said Robert Graham had died on the 5th day of July, 1874; that there descended from him to the plaintiff six hundred acres of lands; that administration on the estate was thereafter granted to

Joseph O. Graham; that the said Joseph O. Graham, as such administrator, had been permitted to receive the rents arising from said lands, as well as the proceeds of other lands descended to the plaintiffs from their mother, and sold by their guardian, and to appropriate such rents and proceeds to the payment of the debts against the estate, in the belief that said rents and proceeds would be sufficient to pay all of such debts, and to thus prevent the lands which had descended to them from their father, as above stated, from being sold to pay any portion of the same; that said estate had proved to be insolvent; that, by reason of the insolvency of the estate, the plaintiffs, acting through their guardian, had permitted the rents and proceeds referred to as above to be applied to the payment of debts against the estate, under a mistake of the facts constituting the true condition of the estate. Judgment was consequently demanded for a repayment of such rents and proceeds. During the progress of the cause, and before it was tried, Joseph O. Graham resigned his trust as administrator, and Thomas R. Hardy was appointed as his successor.

The court, at the request of the parties, made a special finding of the facts, which, summarily stated, was as follows: That Robert Graham died in Spencer county, where he resided, on the 5th day of July, 1874, leaving the plaintiffs, of the ages of eighteen, seventeen and fourteen years, respectively, as his only heirs at law, surviving him; that the decedent, at the time of his death, was the owner of four hundred acres of land, situate in that county, and under cultivation, besides other lands in other places; that Joseph O. Graham was appointed administrator of the decedent's estate, on the 23d day of July, 1874; that, at the time of the decedent's death, a crop of hay was growing on the four hundred acre tract of land, and ready to be cut; that the decedent had, prior to his death, contracted with one Woollen to cut and bale this crop of hay for one-half thereof when baled; that Woollen commenced cutting the hay on the 8th day of July, and completed his contract on the 11th day of November following; that the said Joseph O. Graham, as such administrator, took possession of the decedent's half of the hay thus baled by Woollen, and sold the same for the sum

of \$1,107 80; that the said Joseph O. Graham continued to receive the rents accruing from the four hundred acre tract of the land for the years 1875, 1876, 1877 and 1878, and that Hardy, as his successor, received such rents for the year 1879, making an aggregate for all such years of the sum of \$1,792 34; that of these rents the sum of \$305 was paid over to the guardian of the plaintiffs; that the plaintiffs were the owners of another tract of land, containing eighty acres, one-third of which had descended to them from their father, and the remaining two-thirds from their mother, and for the sale of which their guardian procured an order of sale from the proper court, upon his representation that, by selling the same and applying the proceeds to the payment of the decedent's debts, the sale of the four hundred acre tract for the payment of such debts would be prevented; that their said guardian sold said eighty acre tract of land for the sum of \$600, of which sum \$500 was paid over and applied in payment of the decedent's debts, \$100 being paid over directly to one of the creditors at his request; that all of said rents and proceeds of real estate, paid over as above stated, were in payment of preferred claims against the estate of the decedent; that no order of court was obtained authorizing the administrator to rent any of the lands of the decedent, but that, when the administrator received property in payment of rent, he obtained an order of court for its sale at private sale before selling it; that, on the 23d day of April, 1875, the said Joseph O. Graham, as administrator, filed his petition for the sale of certain lands belonging to the decedent, to pay debts against his estate, and by such petition represented to the court that he had rented the remaining real estate of the decedent for the year 1875, and that he believed the rents for that year would probably amount to as much as \$1,000, asking an order that such rents should be applied to the payment of the decedent's debts; that the plaintiffs' guardian filed his consent that the lands described in the petition might be sold to pay such debts; that thereupon the court ordered said lands to be sold by the administrator, adding "that he apply rents to payment of debts of said Robert Graham;" that no other order was asked for or obtained concerning the rents of the lands be-

longing to the decedent's estate; that all of said rents came from the four hundred acre tract of land; that the said Joseph O. Graham supposed that by using the rents, received by him as above set forth, in the payment of the debts against the estate of the decedent, he could prevent the sale of the four hundred acre tract of land, but that in that supposition he was mistaken, as the estate has since proved to be insolvent.

From these facts the court came to the following conclusions of law:

First. That \$400 of the proceeds of the sale of the eighty acre tract of land sold by the plaintiffs' guardian was paid over to the administrator of the estate of Robert Graham, under a mistake of fact, and that the plaintiffs were entitled to recover from said estate two-thirds of that sum; that is to say, \$266 66, with interest, making the aggregate sum of \$310 65, to be paid as a preferred claim.

Second. That the plaintiffs were not entitled to recover anything from said estate for rents received by the administrators from the lands of which the said Robert Graham died seized.

The appellants, the claimants and plaintiffs below, complain only of the conclusion of law, at which the court arrived, holding that the estate was not liable for the rents received by the administrator, and applied by him to the payment of debts against it.

In support of their appeal, they argue, first, that under the law the rents which accrued on the four hundred acre tract, after the death of Robert Graham, went to them as his heirs, and not to his administrator. It may be regarded as the settled law of this State, as well as the generally accepted doctrine of the authorities, that the rents which accrue from the real estate of an intestate, after his death, go to his heirs, and not to his administrator. (*King v. Anderson*, 20 Ind. 385; *Rubottom v. Morrow*, 24 Ind. 202; *Hankins v. Kimball*, 57 Ind. 42; *Boynnton v. The P. & S. R. R. Co.* 4 Cush. 467; *Haslage v. Krugh*, 25 Penn. St. 97; *Foteauz v. Lepage*, 6 Iowa, 123; *Smith v. Bland*, 7 B. Mon. 21; *Stinson v. Stinson*, 38 Me. 593.)

The appellants argue, secondly, that the provision of the act concerning the settlement of decedents' estates, which requires the administrator to take possession of, and to inventory, the "emblemments and annual crops, whether severed or not from the land, raised by labor" (2 R. S. 1876, p. 505, sec. 34), do not extend to and embrace uncut grass growing in the meadow, and that hence the grass growing upon the four hundred acre tract of land, at the time of their father's death, descended to them, and did not go to the administrator as personal property constituting assets of the estate. Webster defines an "emblement" to be "the produce or fruit of land sown or planted; the growing crops of those vegetable productions of the soil, such as grain, garden roots, and the like, which are not spontaneous, but require an outlay of cost and labor in one part of the year, the recompense for which is to arise in the shape of a crop in another part of the same year;—used especially in the plural. The produce of grass, trees, and the like, is not signified by the term." This definition appears to have been carefully extracted from the text-writers, and is in substantial accord with that given by Bouvier in his Law Dictionary, and by other standard authors. (Taylor's Landlord and Tenant, sec. 534; 1 Hilliard's Real Property, 18, sec. 16, 4th ed.; 3 Washburn's Real Property, 4th ed., marginal page, 599; *Bank, etc. v. Crary*, 1 Barb. 542; *Green v. Armstrong*, 1 Den. 550; Toller on Executors, 193.)

The distinction between annual crops, merely vegetable productions of the soil, raised by labor bestowed during the year, and trees, fruits and grass, which are, to a greater or less extent, of spontaneous growth, may be said to be well recognized and firmly established by the authorities. The words "emblemments" and "annual crops," used in the act concerning decedents' estates, *supra*, do not, therefore, include uncut grass growing in the field, which descends with the land to the heir. This is the construction given to that act by Howland & Winter in their Manual for Executors and Administrators (see page 58, sec. 172), and we are unable to see that any other construction could be fairly given to it without palpably disregarding

the well recognized and firmly established distinction referred to as above.

The appellants argue, thirdly, that the administrator, by taking possession of the growing crops upon, and by receiving the rents of, the real estate which descended to them from the intestate, became their trustee, and not the trustee of the creditors of the estate, and that, by reason of the application of these growing crops and rents to the payment of the preferred claims against the estate, they, the appellants, became not only creditors, but preferred creditors, of the estate, for the value of the growing crops and rents thus applied. The reception by the administrator, except when otherwise specially provided, of the rents, issues and profits of the real estate of the intestate, accruing after his death, makes the administrator the trustee of the heirs, and not of the creditors, of the estate. (*Robb's Appeal*, 41 Pa. St. 45; *Mills v. Merryman*, 49 Me. 65; *Lucy v. Lucy*, 55 N. H. 9; 2 Williams' Executors, 6th ed., bottom p. 820, n; *McCoy v. Scott*, 2 Rawle, 222; *Terry v. Ferguson*, 8 Porter, 500.)

But the application by the administrator of such rents, issues and profits to the payment of the debts against his decedent's estate, does not create any claim against the estate in favor of the heirs. This results from the nature of the liability the administrator incurs to the heirs by receiving money belonging to them, and from the doctrine recognized in the cases of *Rodman v. Rodman*, 54 Ind. 444, and *Hankins v. Kimball*, 57 Ind. 42, heretofore cited. Such an application by the administrator of rents, issues and profits held by him for the heirs, is but an improper commingling of the money and business of two estates at the same time in his hands, and a consequent conversion of the money in his hands belonging to the heirs, for which he becomes personally liable to them. The estate, as an entity, separate from the administrator, is but a fund, an inanimate thing, incapable of becoming a party to such a conversion, and hence cannot be made liable for it to those whose money has been converted by the administrator.

We have not considered the question as to whether the intestate's contract with Woollen, for the cutting and baling

of the crop of 1874, amounted to such a constructive severance of the grass from the land as made that crop assets in the hands of the administrator, as the facts concerning that contract are very meagerly stated in the special finding. But, assuming that contract to have been a binding one upon the estate, the one-half of the baled hay to which the decedent would have become entitled, had he lived, properly became assets in the administrator's hands. Neither have we inquired what effect, if any, the order of court directing the administrator to apply certain rents in his hands to the payment of debts against the estate, may have had as a protection to the administrator as between him and the heirs; as, however that might be decided, no liability on account of that order can result against the estate.

The judgment is affirmed, with costs.

CARD vs. ALEXANDER.

[48 Connecticut, 492.]

BEQUEST TO WIFE.—EFFECT OF DIVORCE FOR HER MISCONDUCT.

Testator bequeathed to his wife A. "the sum of \$400 annually" "out of the income of my estate during her natural life," to be in lieu and in full discharge of all right of dower; and "if she shall refuse to accept the same in lieu of dower then she shall be entitled to have only her right of dower in my estate." Thereafter he obtained a divorce from his wife for her misconduct, and four years later died, leaving a large estate. The wife, by statute, lost her dower after divorce. *Held*,

That the bequest was absolute and not conditional on A.'s remaining testator's wife.

That the divorce did not of itself revoke or annul the bequest.

SUPE for the construction of the will of Luther D. Alexander.

Testator died March 1, 1879, leaving a will dated March, 1873, of which the material portion is set out in the opinion.

In August, 1874, testator was divorced from said Amelia upon the ground of "such misconduct on her part as permanently destroyed the happiness of the petitioner and defeated the purposes of the marriage relation."

He left an estate of about \$120,000, consisting of \$72,000 in personalty, and \$48,000 in real estate.

J. Halsey and *C. E. Searls*, for the defendant *Amelia F. Alexander*.

R. D. Hubbard and *G. W. Phillips*, for the defendants other than *Mrs. Alexander*.

CARPENTER, J. This is an application for a judicial construction of the will of Luther D. Alexander. The second clause of the will, which is the one in question, reads as follows:

"I give and bequeath to my wife, *Amelia F. Alexander*, the sum of four hundred dollars annually, to be paid to her annually by my executor hereinafter named out of the income of my estate during her natural life; said annual payment of four hundred dollars to be in lieu of and in full discharge of all rights, claims or demand of dower on my estate; and if she shall refuse to accept the same in lieu of dower, then she shall have and be entitled to have only her right of dower in one-third of my real estate."

The will bears date and was executed in March, 1873. In August, 1874, Luther D. Alexander was duly divorced from *Amelia F. Alexander* on his own petition, and died on the first day of March, 1879, leaving two children, his heirs at law.

The question now presented for our consideration is, whether the second clause in the will was revoked by the divorce.

We think the bequest is absolute. The words "my wife" are descriptive of the person, and do not import a condition

that if she survives him she shall remain his wife until his death. The words which follow do not change the meaning and have little force. They simply express the testator's will that she shall not have the legacy and dower, instead of leaving it to the implication of law to the same effect. That was more satisfactory to him, and was doubtless all that he intended.

It is a will we are considering, and not a contract. A bequest requires no consideration to support it. Hence the suggestion that the relinquishment of dower was in the nature of a consideration for the bequest has no special force. It is true that by accepting the bequest she would thereby have relinquished her right of dower if she had had such right, and by electing to take dower she would have waived her right to the bequest; but that does not make the one, in a legal sense, a consideration for the other. Motives or reasons for doing an act are quite distinguishable from a legal consideration essential to the validity of an act.

The counsel for the heirs, however, insist that she must not only be willing but able to relinquish her right of dower; that is, that she must actually have such right at the time of her husband's death. No such condition is expressed in the will, and the words used do not imply one. They afford slight if any evidence that such a condition was in his mind. If he had intended it apt words to express such an intention would doubtless have been employed. In the absence of such words we must infer that he had no such intention.

But it is contended that the divorce by operation of law revoked his bequest. No case is cited in support of this position, and we are not aware that any exists. It may be true that the divorce divested the wife of all those executory property rights which had no basis but the coverture; but that hardly reaches this case, for here the right rests mainly, not upon coverture, but upon the will; and it cannot be said that coverture was the sole motive or inducement to the will. After that was taken away it still remained true that she had been his wife, and that she was the mother of his children. It is hardly credible that any man of ordinary sensibilities would

desire to leave her destitute. Add to this the further facts, which exist in this case, that the testator was possessed of a large estate, that the provision made for the wife was a mere pittance, and that he lived nearly five years after the divorce, making no change in his will, and the conclusion is well nigh irresistible that he did not intend to deprive his former wife of the provision he had made for her. There is not, therefore, sufficient reason for presuming that the testator intended by procuring the divorce to revoke the legacy to her; and these considerations are cogent reasons why we should not hold, as matter of law, that the divorce revoked the legacy.

Moreover, the analogies of the law, so far as there are any, are against it. The death of the wife during the lifetime of the testator defeats the legacy, because it then lapses as in ordinary cases. The dissolution of a corporation legatee has the same effect. In these cases the objects of the testator's bounty cease to exist before the will takes effect. In this case she survives and is capable of taking. A more analogous case is that of marriage; and it is now well established that marriage alone will not revoke a will previously made. In order to have that effect there must be coupled with it the birth of a child or children.

We think the second clause of the will is operative, and the Superior Court is so advised.

In this opinion the other judges concurred.

HAWKINS vs. HAWKINS.

[54 Iowa, 443.]

WIFE OF LEGATEE AS SUBSCRIBING WITNESS.

The wife of a legatee is a competent subscribing witness.

TESTATOR Samuel Hawkins by his will directed that his estate be divided between J. C. Hawkins, W. H. Hawkins and Mary E. Barton, his brothers and sister.

The will was witnessed by W. H. Hawkins, T. C. Hawkins, the wife of J. C. Hawkins and Isaac Van Gilder, the executor therein.

Mitchell & Penick, for appellant.

J. R. Hurford, for appellees.

ROTHROCK, J. W. H. Hawkins was directly interested in the will as a legatee, and being a subscribing witness thereto he could derive no benefit therefrom, unless there were two other competent and disinterested witnesses. Section 2327 of the Code provides that "no subscribing witness to any will can derive any benefit therefrom unless there be two disinterested and competent witnesses to the same."

The only question to be determined then is, was T. C. Hawkins, the wife of W. H. Hawkins, a disinterested and competent witness? That she was a competent witness in the general sense cannot be disputed. By section 3636 of the Code it is provided that "every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, both civil and criminal, except as herein otherwise declared." A married woman, then, is a competent subscribing witness to a will. She is not within any of the exceptions contained in the Code. If it be said that she is not competent to establish that part of the will which makes her husband a legatee, the answer is, by section 3641, the husband or wife are, in all civil and criminal cases, competent witnesses for each other.

Is the wife a disinterested witness? No person offered as a witness is incompetent by reason of his interest in the event of the action or proceeding, except in certain cases. Code, § 5435. This section is qualified by section 2327, which requires that a legatee or devisee, who is a subscribing witness to a will, can derive no benefit therefrom unless there be two disinterested and competent subscribing witnesses. Our statute nowhere defines the interest which disqualifies a witness. See the general statute upon the subject. No such definition was necessary, because, as we have seen, interest does not, in general, disqualify. We are, then, to inquire whether, under the common law, modified by our statute making the wife a competent witness, has she such an interest in the legacy given by the will to her husband as to exclude her as a witness? In 1 Greenleaf on Evidence, sec. 386, it is said: "This disqualifying interest, however, must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself or in the record as an instrument of evidence in support of his own claims in a subsequent action. It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or consanguinity, or any other domestic or social, or any official relation, or any other motives by which men are generally influenced; for these go only to the credibility * * *."

Again, in section 390, it is said: "The true test of the interest is, that he will either gain or lose by the direct legal operation and effect of the judgment * * *. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent." See, also, *Cutler v. Fanning*, 2 Iowa, 580.

We think that by these rules the wife was a disinterested witness. She had no present, certain and vested interest in the legacy given to her husband. It was remote and contingent. It will be observed that this is not a devise of real estate. The will contemplates that whatever real estate there may be shall be sold to pay the legacies. Now the wife has no present, vested interest in such a legacy to the husband. It is his own to dispose of at his pleasure, and there are many con-

tingencies which may intervene to prevent the wife from ever acquiring any part of it.

We think the wife was a competent and disinterested witness, and that the court erred in excluding her testimony as applicable to the legacy of her husband.

Reversed.

See *Stewart v. Harriman*, 1 Am. Prob. R. 95; *Smalley v. Smalley*, Id. 506.

LE FEVRE vs. TOOLE.

[84 New York, 95.]

LEGACY, WHEN CHARGE ON REAL ESTATE.

Testator, after directing the payment of his debts and funeral expenses, and after giving a series of legacies, gave the residue of his estate, real and personal, to his wife. Then followed this clause: "and I authorize my executors, after paying my just debts and funeral expenses, to pay over to my wife \$5,000 in cash out of the bequeath to her and before any of the other bequeaths are paid off." The executors were authorized and directed to sell and dispose of all of the real and personal estate, with power to reserve certain parcels of real estate until prices specified could be obtained therefor. In an action to obtain a construction of the will, *held*, that the intent of the testator was to charge the payment of the legacies upon the real estate; also, that the gift to the wife was in lieu of dower.

APPEAL from a judgment of the Supreme Court at General Term, affirming a judgment entered at Special Term.

The action was brought by plaintiffs, as executors of the will of William S. Toole, to obtain a construction of such will.

The testator directed, "after the payment of all my just debts and funeral expenses, I give and bequeath to my sister Jane the annual interest on the sum of \$12,000 during her lifetime, my executors or executor to invest that amount, and the interest thereon applied for her support during life."

Numerous legacies of different sums of money were then given, followed by the following clauses :

"And I give and bequeath to my wife Eliza Priscilla all the rest and residue of my real and personal estate ; and including the amount which is reserved for my sister Jane's support during life, and which amount, after the death of said sister, is for my wife or her heirs.

"And I authorize my executors, after paying my just debts and funeral expenses, to pay over to my wife the sum of \$5,000 in cash out of the bequeath to her, and before any of the other bequeaths are paid off.

"And I do hereby appoint my brother-in-law, Benjamin D. Le Fevre, and Captain Peter E. Le Fevre, both of New Rochelle, Westchester county, to be the executors of this my last will and testament, and in case either of them should decline, then I appoint Dr. John Conway, of the city of New York, in their place to carry this will into execution, and do hereby request and empower them, or whichever of them shall assume the execution of this my last will, to proceed and dispose of all my real and personal estate, which is situate in New Rochelle and Mamaroneck, Westchester county and State of New York, and in Newark, State of New Jersey, and in Barry and Clinton counties, State of Michigan ; and I authorize my executors to reserve the property on which I reside until such time as it can be sold for not less than \$30,000 dollars in cash, or its equivalent. And also the property in Huguenot Park and town of Mamaroneck, at from \$12,000 to \$15,000 each. And request my executors, or whichever shall assume the execution of this my last will, to proceed with due diligence in realizing my personal estate, as well as the real estate, with the exceptions named. And give them power to sell and convey my real estate and give good and sufficient deeds therefor."

The court found the value of the testator's personal estate at his death to be \$20,000, and that he did not at the date of the will possess sufficient personal estate to pay his debts and the legacies.

S. F. Cowdrey, for appellant.

Clarkson N. Potter, for respondent.

FOLGER, C. J. We think that the testator intended to charge the payment of the legacies upon his real estate. All things in the will combine to show that intention.

After giving direction to pay his debts and funeral expenses, he gives a series of legacies, which are not unnatural in the objects of them. He then authorizes his executors, after paying debts and funeral expenses, to pay a sum certain to his wife in cash, but to pay it out of the "bequeath" to her. By that word he means that which he has given to her in another part of the will. That which he has thus given to her is the rest and residue of his real and personal estate.

If the \$5,000 is to be paid to her out of that gift, does it not seem a giving twice of the same gift, and an unmeaning thing? It would clearly seem so, but for the clause that goes with it, that this sum of \$5,000 is to be paid before any other of the bequests are paid off.

This deferring of the other bequests until the payment of the \$5,000 has no significance unless the other bequests are to be paid from the same fund as the \$5,000 to the wife. What is that fund? It is the rest and residue of the real and personal estate. That rest and residue is all that the testator gave his wife; it is only from that rest and residue that the \$5,000 is to be paid. As it is to be paid therefrom before the other bequests are paid off, it cannot have been meant otherwise, but that they were to be paid therefrom also, though not until after the \$5,000 were paid to the wife. The power to proceed and dispose of all the real and personal, the request to proceed with due diligence in realizing the personal as well as the real estate, and the power to sell and convey his real estate, indicate the intention of the testator that the executors should come into the possession of a fund for some purpose. It could not have been for the purpose of paying the avails of the real estate over to the widow only, for if the real estate is not charged with the payment of legacies, and is left to her unincumbered thereby, she could sell and take the avails as well as the executors could sell and pay them to her. It could not have been to raise money to pay debts, etc., for there was clearly enough personal estate for that. There is but one other

purpose to be found in the circumstances of the testator, and that is to raise a fund for the support of his sister, to pay the widow the \$5,000 for her, and to pay off the other legacies.

We have so lately discussed this general subject in varying states of facts, and differing provisions of wills, that we need not re-state principles here. (See *Taylor v. Dodd*, 58 N. Y. 335; *Kalbfeisch v. Kalbfeisch*, 67 id. 354; *Bevan v. Cooper*, 72 id. 638.)

There is no prohibition as is claimed upon the sale of portions of the real estate. There is a permission to reserve until a certain price is offered. The direction to sell is somewhat peremptory. The testator thought it needful to abate its tone. He therefore gave authority, not command or direction, to reserve portions for the offer of a price named.

The widow has not lost her right of dower in the lands, nor has it been taken away. The testator has given her what he thought would be better than, or as well as, dower. If she is not of that mind, she can reject the gift and take the dower that the law gives. The testator's evident intent was that his gift should be in lieu of dower, if the gift was taken by his widow.

We think that the legal questions arising in the suit were well disposed of in the courts below.

The judgment should be affirmed.

All concur.

Judgment affirmed.

See *Hoyt v. Hoyt*, *ante*, page 318.

WOODRUFF vs. YOUNG.

[48 Michigan, 548.]

ADMINISTRATION OF ESTATES IN DIFFERENT JURISDICTIONS.—MULTIFARIOUSNESS OF BILL FOR ACCOUNTING.

Where certain tribunals have acquired jurisdiction over an estate and its representative within their territory, the representative is bound to account to them only for all assets, and the courts of other States cannot interfere.

A bill is multifarious that seeks to compel accounting as to the management of an estate, and to enforce complainant's right as devisee, and which charges the executrix with fraud in obtaining from complainant a deed of property, and a co-defendant with individual frauds.

APPEAL from Jackson. Bill for accounting and other relief.

J. C. Lowell and *Thomas A. Wilson*, for complainant.

John D. Conely and *Alfred Lucking*, for defendant.

GRAVES, J. This is an appeal in equity against the allowance of a general demurrer and dismissal of the bill. The question whether the appearance, which was expressed as being for no other purpose than to dispute the jurisdiction, did or did not admit it, is hardly worth discussing. If the substantial matter of the bill was manifestly improper for the cognizance of the court, an appearance by solicitor, made expressly for the exclusive purpose of submitting the objection by demurrer, could not render the matter proper.

The complainant sets up that until June, 1857, her father, James Young, together with her mother Elizabeth and herself, and her sister Mary L., and her brother James A. Young, resided in the county of Livingston in the State of New York, where her father owned a large real and personal estate; that he then and there died, leaving a will by which he gave her mother an equal one-third of the entire property, and the residue in equal parts to herself, her brother and sister, and appointed her mother sole executrix; that the will was duly established in the Surrogate's Court for the county of Livingston, and its execution duly committed to her mother as sole

executrix by the usual letters testamentary, and that she "entered upon the discharge of her duties as such executrix, and has continued to act as such from thence hitherto;" that up to November, 1863, the family, including complainant, lived together in Livingston county and used the estate in common, the executrix exercising full control and having the entire management; that complainant then married her present husband, Charles P. Woodruff, and with him removed from the estate, and some years later established a residence here, and that she now lives in Jackson; that in 1870 her sister married Seth N. Hedges, an attorney-at-law, and that he, together with his wife and the executrix, have continued to reside in New York; that the estate is still unsettled and her full share not yet paid, whilst her right to anything further is denied; that her brother-in-law Hedges has obtained a complete ascendancy over her mother, and holds entire dominion over the estate and refuses to recognize complainant's right, and that no accounting with her has been had or any settlement with her effected. She expressly declares that she files the bill "against the said Elizabeth Young and one Seth N. Hedges, as defendants herein to compel them, and each of them, to account to and with her in relation to their management of said estate, and to enforce and recover her rights as devisee and legatee under the said last will and testament."

But the bill does not stop with the complaints referred to. It introduces separate transactions, and charges complainant's mother with fraudulent practice in obtaining a deed from complainant of property in Dexter, and also charges her brother-in-law Hedges with distinct and individual frauds upon her.

It is quite unnecessary to descend to particulars and repeat the statements found in the bill. That the case it presents, so far as it exhibits anything definite, is one the court cannot tolerate, is extremely plain. In the first place, it undertakes to combine incongruous matters of complaint, and is strictly exposed to the charge of being multifarious; and moreover, in addition to the blending of distinct and independent grievances, it has the vice of misjoinder of defendants. The separate individual frauds of the executrix and of her son-in-law,

if capable of investigation in the same case with the demand for an accounting, are not compatible with each other for joint litigation. Neither the executrix nor Hedges is a proper defendant in respect to the fraud of the other, and it is not apparent that the state of facts would justify the joinder of Hedges in the case for an accounting by the executrix. But beyond these difficulties, the leading purpose of the bill is wholly inadmissible.

The only authority competent to deal with the administration of the estate, in view of its situation and that of the representative, is that of the courts of New York. The estate and the representative are there, and within the scope of the authority of her tribunals, one of which has gained and holds lawful cognizance; and it is to her tribunals that the executrix is exclusively bound to account for all the assets, and no foreign tribunal under the circumstances disclosed has any right to interfere. *Spoon v. Baxter*, 31 Mich. 279; *Vaughan v. Northup*, 15 Pet. 1, and authorities cited by defendants' counsel.

Many reasons might be cited. Once admit the right of interference in such a case at the instance of a single claimant, and the consequence follows that every foreign jurisdiction having a resident able to set up a claim may intervene at the same time and assume the right to supervise the administration, and require accounting and settlement according to its own views. Any number of intervening claimants may be reaching out at the same time, through as many different tribunals, for the exclusive supervision and winding up of the administration or some part of it, and each entitled equally with every other. A bare reference to some of the possible; and indeed probable consequences, is sufficient to expose the erroneousness of the claim.

The charge against Hedges, of having used complainant's money to buy land in Jackson county in his name, if sufficient to answer any purpose by way of statement of a cause of action in equity, is confined to Hedges, and does not touch Mrs. Young. It is not necessary to add more.

The decree is right, and must be affirmed with costs.

The other justices concurred.

See *Price v. Mace*, 1 Am. Prob. R. 73.

SCOTT vs. FINK.

[45 Michigan, 241.]

REVIVAL OF REVOKED WILL BY CANCELLING LATER WILL.

A will is not revived by the destruction of a subsequent will when the latter or any intermediate will had contained a clause revoking all former wills.

APPEAL from probate.

J. C. Shields and *H. P. Henderson*, for plaintiffs in error.

M. V. & R. A. Montgomery, for defendants in error.

GRAVES, J. Sarah Scott propounded for probate an instrument purporting to be the last will of her father John Fink. Opposition was made by John Fink, the half brother, and by Mary Fink, decedent's widow, and the step-mother of said John and Sarah. The Court of Probate admitted the instrument as decedent's last will, and the contestants appealed from the decision. An issue seems to have been made up in the Circuit Court, but the record fails to explain its shape. Enough appears to indicate that proponent affirmed the instrument in question as the last will of the deceased John Fink, and that the contestants alleged revocation by means of a later will. The form given to the alteration is not important, because it is manifest no one was misled. The contest was before a jury and they decided against proponent, and she then brought error.

The surrounding facts are not disputed. At the time of his death the decedent had been three times married. The contestant John was a child by the first wife, and the proponent Sarah a child by the second. There was no issue by the third. In 1869 the decedent removed with the second wife and their daughter Sarah to Williamston in Ingham county, and there established his residence on a small place of between seventeen and eighteen acres, the family consisting of the three. His entire estate was worth something more than

\$10,000, and was all personal except the little farm place just mentioned. Soon after he took up his residence in Williams-ton, and on the 15th of November, 1870, he made and published the will sought to be established. He brought it home from some place after it had been drawn and executed, and delivered it to his wife, who read it, and then passed it to her daughter, the proponent, to take care of. After providing for the payment of debts and expenses it purported to give his son, the contestant John, \$300, and all the remainder of his property to his then wife, Anna Fink, for life, and remainder in fee to his daughter, the proponent Sarah.

He appointed proponent's mother, Anna, sole executrix. He subsequently made another will containing similar provisions. It was executed within a year or less after the first. The first will fixed the time for payment of the legacy to John at two years after the testator's death, and the second one extended the time to three years, and also stated by way of explanation for not giving more to John, that the testator had previously helped him. The second will differed in no other respect from the first.

September 1st, 1875, Anna Fink, proponent's mother, died. Shortly after that event decedent made and published a third will. It was drawn by Mr. Smith, and the scheme was altered to meet the change which had taken place. The decedent took it home and showed it to his daughter, the proponent, and she read it, and he placed it among his private papers. And on that occasion he burned the second will. His daughter, the proponent, was named executrix in the third will. There was no controversy at the trial about the formalities of the first will. Had nothing occurred after its publication to impair it, it must have been regarded as its author's last will. This is virtually conceded.

The proponent was sworn as a witness on the part of contestants, and she testified concerning the second and third wills. Indeed the entire history of the second will was derived from her. She also explained how her father brought home the third will, and how she examined it, and what its provisions were. She testified that she was named executrix ;

that three hundred dollars were given to her half brother and the remainder to her; that there were no other bequests, and that she cannot tell whether it contained a clause of revocation or not. She also mentioned that there had been rumors of the destruction of the third will. She did not swear it was still extant. On the contrary, she testified that she did not see it destroyed, and that all she knew about its destruction was, that after her father's death the report went out that it was destroyed, but that she did not know from whom.

It is not unworthy of notice that the deposition of proponent established the existence of the third and latest will, and showed that its provisions were inconsistent with the first, and hence sufficient to work a revocation of it, and moreover, that so far as she knew, it was still in existence. At the conclusion of her evidence, therefore, the third will was presumptively on foot, and there was a *prima facie* case of revocation of the first. But the contestants proceeded with commendable fairness to explain all the facts.

In July, 1876, the decedent intermarried with the contestant, Mary, in Oswego county, New York, and she returned with him to Williamston, where they resided together as husband and wife, until his death. When he went to New York, he carried his third will with his other papers, and showed it to her, and on his return to Williamston, and whilst looking over his papers, he took the will out and handed it to her with the request to put it in the stove and burn it, and she complied, and it was then burned. The proof was positive that it contained a clause of revocation. The testimony of the gentleman who drew it and of his law partner, who knew its contents when it was executed, was in some respects different from that of proponent in relation to its dispositions, but these variances afford no aid to her case on any theory.

That this third will was destroyed by its author is not disputed. The declarations made to his daughter, the proponent, on the occasion of his bringing home the third will and destroying the second, were adduced in evidence, as were also his declarations to his wife, the contestant Mary, on the occasion of requesting her to burn the third will. But the point in the

case is whether the cancellation of the third will was sufficient to restore the first. The proponent insists that it was, and the contestants deny it.

There has been much difference of opinion on the question whether the revocation of a second will is of itself sufficient to revive the first. For the last century those maintaining that it is, argued that the second will is without force against the first unless it becomes effective by being allowed to survive the testator, and the opinion of Lord Mansfield in *Harwood v. Goodright* (Cowper, 87), is cited as conclusive. That case originated in the Common Pleas, and is fully reported in 3 Wilson, 497. There was a special verdict. No revocation was found, nor the existence of revocable words, nor what were the provisions of the second will, or any of them. And the jury stated expressly that they did not find that the testator cancelled the second will, and that they were altogether ignorant as to what had become of it. The point in question was not in the case, and Lord Mansfield's observations, as reported in Cowper, were purely *dicta*.

A little earlier, and in Easter term of the same year, the King's Bench had the case of *Burtenshaw v. Gilbert* before it. (Cowper, 49.) One Newenden made his will in 1759, in duplicate, giving one part to the scrivener to keep, and retaining the other himself. He observed that it did not suit him, and that he made it to keep his wife easy. His wife died. Thereafter, and in 1761, he produced the part of the old will in his possession, and made another will with different devises. He tore off his name and seal from the part which was present of the old will, and caused the names of the witnesses thereto to be cut off. He made some explanations to the scrivener, and placed the new will in his custody. Some changes occurred thereafter, and one of the objects of his bounty died. He sent for the second will, and afterwards for an attorney to draw another, who however did not reach him until he was too far gone to do anything. After his death one part of the first will and the second will were found together in a paper, both cancelled. The other part of the first will was found uncanceled in the testator's room, with other deeds and papers. The ques-

tion for the court was whether the first will was revoked. Lord Mansfield observed, among other things, that "if the testator had died immediately after he made the new will, whether he had cancelled the former or not, it would have been revoked; because at the end of the second will, there is a declaration by which he revokes all former wills. Besides this he deliberately cancels that part of the will of 1759 which he had in his own possession. The facts are too many and too strong to admit of a question, but that, at the time of making the second will, the first was, upon every principle of law clearly revoked, and can never be set up again but by a new will." The court takes notice, it is true, of the act of mutilation of the one part of the old will, but the circumstance on which stress is laid is the existence of revocable words in the new will, and there is strong ground for inferring that the result would have been just the same if the act of spoliation of the one part of the old will had not been committed.

In *Goodright on the demise of Glazier v. Glazier*, reported in Burrow, 2512, it does not appear that the second will contained a clause of revocation.

There seems to have been a material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it.

In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have had the effect to do away with its predecessor. Being cut off before having its dispositions of property awakened into life, it could have no affirmative operation through its dispositions upon the estate.

In the second case the written declaration is express and in plain terms immediate and absolute. It is a verbal act done

solemnly and deliberately for present effect, and not an act contemplating that future circumstances are to determine whether after all it shall have any force. It is not a needful ingredient of the will. That is perfect without it. The addition of it is a mode of immediate cancellation of prior wills, and quite as unequivocal and unambiguous as many others within the statute whose meaning is open to no controversy. It operates at once, and does not apply as a mere contingent caveat against the objects at which it is aimed. It revokes them without reserve or qualification. And in case the document with which it is connected is itself revoked, that fact can have no effect as a restoration and republication of former revoked wills.

It is only necessary to glance at the authorities to see that judicial opinion, as already suggested, is not harmonious in regard to this question. Much, no doubt, of the diversity may be traced to variety of legislation, but not all. Upon consideration, the doctrine of *James v. Marvin*, 3 Conn. 576; *Boudinot v. Bradford*, 2 Dall. 266, and others holding the same views and ruling in accordance with what has just been expressed, appears to be most consonant with our system and with popular understanding, and at the same time the most reasonable and safe. Having reached this result, it is only necessary to add that the proponent has no occasion to complain of the rulings. She was not prejudiced.

The order of the Circuit Court should be affirmed with costs.

The other justices concurred.

Revival of prior wills by revocation of later one.—In England the question treated of in the principal case is now regulated by the statute 1 Vict. ch. 26, which provides in substance that no will once revoked can be revived, except by a re-execution thereof or by a codicil showing an intention to revive the same.

Under this act it has been held entirely clear that the destruction of a second will containing a revoking clause cannot revive the prior testament; an "intention to revive" can only be shown by a codicil or re-execution of the former will. *Major v. Williams*, 8 Curteis, 458; *Brown v. Brown*, 8 E. & B. 876.

A like decision has been made in Virginia under a statute in almost the

same language as the English act cited. *Rudisill's Exr. v. Rodes*, 29 Gratt. 147.

Prior to the statute of Victoria there was a diversity of rulings in the common law and ecclesiastical courts. The former held that the revocation of the later will, irrespective of its containing a revocation clause, operated as a revival of the earlier writing. *Harwood v. Goodright*, Cowp. 92; *Goodright v. Glazier*, 4 Burr. 2512.

In the ecclesiastical courts proceeding according to the civil law, there were decisions that in such instances a presumption existed against a revival of the earlier will, but the weight of later decisions made the question of restoration depend on the intention of the testator to be drawn from the circumstances of each case, and parol evidence was receivable to show such intention. *Moore v. Moore*, 1 Phill. 412; *Horton v. Head*, 3 Id. 32; *Usticke v. Bowden*, 2 Add. 116; *James v. Cohen*, 8 Curt. 770.

While it is true, as stated in the principal case, that it does not appear from the report of *Goodright v. Glazier* in *Burrows*, that the second will contained a revocation clause, yet it is pointed out in a note to 1 *Williams on Exrs* [178], that the existence of such a clause in the second will does appear in the report of the case in *Buller's N. P.*, page 266. See further remarks of *Serjeant Davy*, *arguendo*, to the same effect. *Goodright v. Harwood*, 3 *Wilson*, 497-510.

In the United States there are but few authorities directly on the point raised in the principal case. Nearly all the States have latterly passed statutes regulating the subject, and modeled in most instances on the act of 1 Victoria, ch. 26.

In the following cases remarks are to be found in favor of the English common law doctrine above stated. *Bates v. Holman*, 3 *Hen. Munf.* 502, 525; *Pringle v. McPherson*, 2 *Brev. (S. C.)* 279; *Taylor v. Taylor*, 2 *Nott & McC.* 482.

In *Marsh v. Marsh*, 3 *Jones' L.* 77, the court reviews the earlier English cases, but does not express any opinion as to the true rule placing the case at bar, on the ground that the evidence showed the second will was executed on the supposition that the earlier will was lost, and on the recovery of the latter testator declared he preferred it and destroyed his second will.

In *Randall v. Beatty*, 31 *N. J. Eq.* 643, the Ordinary, after reviewing the authorities, held, "the true rule on the subject is, that where one will is revoked by another the revocation is testamentary and the revocation of the later will revives the former."

A similar decision is made in *Flintham v. Bradford*, 10 *Pa. St.* 82, although the second will in this case was a revocation of the prior one by implication only. In the New Jersey case there was an express revocation clause in the later will.

See also remarks of *McKean*, Ch. J., in *Lawson v. Morrison*, 2 *Dall.* 236.

The reasoning of the authorities favoring the rule that a revocation of a later will containing a revocation clause does not revive prior wills is thus stated by *Smith, J.*, in *Bohannon v. Walcot*, 1 *How. (Miss.)* 336-339: "A will is ambulatory and has no effect until the death of the testator. If he

lets it stand until his death it is his will, but if revoked it cannot be. But when revoked it cannot be considered as having either a present or a potential existence, and must require some express and direct act of the testator, which, in fact, does not revive the defunct will, but adopts it as the present will of the testator, and it is to be regarded as a new testamentary act of the party."

See remarks to the same effect by Chancellor Kent in *Walton v. Walton*, 7 Johns. Ch. 258-270, and by the court in *Simmons v. Simmons*, 26 Barb. 68, 76, 77; *Lively v. Harwell*, 29 Ga. 509, 515.

In *Colvin v. Warford*, 20 Md. 357-391, a distinction is suggested between the revocation of a previous will by implication from inconsistent testamentary provisions in one subsequently executed, and an express revocation in a later will, inasmuch as in the former case "the revocation of the first will depends upon the testamentary purposes expressed in the last, which, of necessity, continue to be ambulatory and revocable during the life of the testator. * * * But a clause in a subsequent will, which, in terms, revokes a previous will, is not only an expression of the purpose to revoke the previous will but an actual consummation of it, and the revocation is complete and conclusive without regard to the testamentary provisions of the will containing it."

MILLIKIN vs. WELLIVER.

[37 Ohio State, 460.]

ELECTION BY WIDOW TO TAKE DOWER OR PROVISION IN WILL.

An election by a widow to bar her of dower must be made in person—it does not pass to her legal representatives on her decease. It must be by matter of record in court as required by the statute, or under such circumstances as create an estoppel against her legal right.

Where it does not appear that the widow acted with a full knowledge of the condition of her husband's estate and of her rights under his will, the payment of his debts out of his money, receiving and holding the balance, and possessing and controlling the real and personal estate for five months do not create such an estoppel.

THIS case involves the rights of the parties to the personal estate of John D. Smith, deceased. A second case, argued at

the same time, entitled *Creecraft v. Smith*, involved the rights of the parties to the real estate.

The facts relating to each will be stated as if there was but one case. The first case was submitted in the trial court upon an agreed statement of facts, which are substantially as follows:

The agreed case shows: That John D. Smith died April 30, 1877, testate; his will was probated May 10, 1877; John D. Smith left no issue, but left Elizabeth Smith, his lawful wife, to whom he was married in 1839. Elizabeth Smith (the widow) died August 1, 1877, intestate, and without issue. She never attempted to divide or distribute the real or personal estate of John D. Smith in any way. William B. Millikin is the administrator of Elizabeth Smith, and Enoch D. Creecraft and the other plaintiffs are her legal heirs and distributees. P. J. B. Welliver is the administrator of John D. Smith, and Joseph Smith and the other defendants are the brothers and sisters (and representatives of a deceased brother and sister) of John D. Smith.

No administration was taken out on John D. Smith's estate, until August 10, 1877 (after Elizabeth's death), when Welliver was appointed his administrator with the will annexed. Millikin was appointed administrator of Elizabeth Smith, August 22, 1877. The debts of John D. Smith and his funeral expenses were all paid by Elizabeth Smith out of his estate. No year's support was set off to her, but \$500 would have been a reasonable sum for a year's support if she was entitled to have the same set off.

Besides paying his debts and funeral expenses, John D. Smith left \$8,750 in money, which, at his death, was taken possession of by Elizabeth, his widow, and by her, on May 10, 1877, deposited to her individual credit, in Second National Bank of Hamilton, where it remained at her death. It is agreed that \$650 of said sum was her separate estate (being referred to in the will), and it is withdrawn from controversy. leaving balance of \$8,100 in bank in controversy.

The balance of John D. Smith's personal estate, consisting of horses, cattle, hogs, farming utensils, household furniture.

grain, etc., was, at John D. Smith's death, taken possession of by the widow, Elizabeth, and retained by her until her death.

Welliver, when appointed administrator of John D. Smith, took possession of the same, and had it appraised and sold as the property of John D. Smith, the entire proceeds being \$2,359 89, which was the reasonable value thereof, and now in the hands of said Welliver as administrator. Said appraisal and sale was made against the protest of William B. Millikin, administrator of Elizabeth Smith.

Of the said grain sold was 715 bushels of corn, sold for \$250 25, which was planted after the death of John D. Smith, on the real estate owned by him and devised in his will, by a tenant to whom, by verbal agreement before his death, John D. Smith had rented the farm for the year 1877 on the shares. The plowing was done by the tenant before John D. Smith's death.

The will of John D. Smith, dated April 24, 1875, is as follows :

"I, John D. Smith, of Reily township, Butler county, Ohio, make and publish this my last will and testament as follows, to wit: I direct that my funeral expenses, and all just debts be paid as soon after my decease as possible. The residue of my estate, both real and personal, that I may possess at my decease, I give and bequeath to my beloved wife, Elizabeth Smith, during her lifetime; she to have full possession, management and control of the same, with the privilege of disposing of any or all of the personal property for her use, together with all the proceeds of the real estate; she to have the privilege of disposing of six hundred and fifty dollars at her death to whomsoever she may see fit (being the amount received from her father's estate); the residue of my estate is to be distributed to the heirs of my side of the house in such portions as she may direct by will or otherwise.

"In witness whereof, I, John D. Smith, the testator, have hereunto set my hand and seal this 24th day of April, A. D. 1875."

The second case, relating to the real estate, was submitted on an agreed statement of facts, showing also that John D.

Smith, at his death, was seized of certain parcels of real estate, all of which, except thirty-five acres, came not by descent, devise or deed of gift, and that Elizabeth Smith was married to him in 1839, and continued his lawful wife until his death.

Thomas Millikin, for plaintiff in error.

Moore & Moore, for defendant in error.

JOHNSON, J. Much of the argument of counsel as well as the judgments of the court below, is on the assumption that Elizabeth Smith, the widow, took under the will of her husband, John D. Smith. This necessarily involves a construction of the will, in order to determine the widow's rights thereunder, and the rights of her representatives.

If, however, the widow did not take under the will, expressly as prescribed by the statute, or impliedly by such acts as would have estopped her from denying such election, then she takes under the law. If the latter is the case, it becomes immaterial to inquire what the will would have given her, had she taken under it. If she did not take under the will, the law fixes her rights.

If any provision is made by will for a widow of the testator, it is the duty of the Probate Court, to forthwith after the probate of the will, issue a citation to the widow, to appear and make her election, whether she will take such provision, or be endowed of the lands of her husband. This election is to be made within one year from the date of service of the citation upon her. It must be made *in person*, and in the Probate Court, except where a commission is authorized to take such election. It is to be made after an explanation of her rights under the will, and under the law in the event of her refusal, and is to be made a matter of record.

"If the widow shall fail to make such election, she shall retain her dower, and such share of the personal estate of her husband as she would be entitled to by law, in case her husband had died intestate leaving children." To determine the matters in controversy, we must first ascertain whether Elizabeth Smith took under the will, or under the law.

That she was not cited before the Probate Court, nor her election made a matter of record, is conceded. She died before the time had expired in which she could have elected.

She alone could elect. It is a personal right. Neither her administrator nor her heirs could make it.

But it is claimed that, although she did not elect as prescribed by statute, yet she in *fact* did so elect, and that her rights depend on the terms of the will. This claim is that the facts agreed on show such an actual election as would have estopped her, had she lived, from claiming under the law.

The facts relied on for this purpose are, that during the time she survived her husband, some five months, no administrator was appointed, nor was any claim made for dower; that she paid the debts and funeral expenses; that there was left some \$8,000 in cash, which she deposited in bank in her own name, and that she took and retained possession of the personal property of her husband, consisting of stock on the farm, farming utensils and other chattels. She did not attempt to convert any of this property to her own use, nor place it beyond the reach of an administrator of her husband's estate, when one should be appointed. Indeed, every dollar of the assets, as appears by the agreed statement, which remained after payment of debts and funeral expenses, remained at her death within the reach of the representatives of her husband. The will gave her a power of sale of the personal property, and the rights to the proceeds of the farm, and an absolute disposal of \$650, the amount received from her father's estate, yet she exercised none of these rights.

The acts relied on are by no means conclusive. They are not inconsistent with an intention to elect, when cited, to take under the law. They are such acts as would preserve the estate intact for that purpose. This may have been the intention of the widow.

While they tend to prove that she was acting under the will, they are not so inconsistent with her rights under the law as to estop her from claiming under the law, especially when only a few months had elapsed since her husband's death, and there was no personal representative of the estate. It can

hardly be claimed that, had she been cited to appear before the court to make her election, after doing these acts, she would have been denied her election.

In order that acts of a widow shall be regarded as equivalent to an election to waive dower, it is essential that she act with a full knowledge of all the circumstances and of her rights, and it must appear that she intended, by her acts, to elect to take the provision which the will gave her. These acts must be plain and unequivocal, and be done with a full knowledge of her rights and the condition of the estate. A mere acquiescence, without a deliberate and intelligent choice, will not be an election. 1 Lead. Eq. Cas. title "Election;" *Anderson's Appeal*, 36 Penn. St. 476, 496; *Bradford v. Kent*, 43 Penn. St. 474; *English v. English*, 5 Green's Ch. 504; *O'Driscoll v. Koger*, 2 Dessaus. 295; *Wake v. Wake*, 1 Vesey, Jr. 335; *Reynard v. Spence*, 4 Beav. 103; *Tooke v. Harde-man*, 7 Geo. 20; *Dixon v. McCus*, 14 Gratt. 540.

It is believed no case can be found where the facts are held sufficient to amount to an election to waive the widow's rights under the law, unless they are of such a marked character and of such long duration as will clearly and distinctly evince a purpose to take the provisions of the will, and to operate as an effectual equitable bar to dower.

Thus, where real estate was devised to a widow for life, remainder in fee to her sons, and she in fact took under the will and occupied the premises for more than *sixteen years*, she was estopped to deny her election. *Thompson v. Hoop*, 6 Ohio St. 480.

So in *Bradford v. Kent*, 43 Penn. St. 474, it was held that where a widow, with full knowledge of the value and character of her husband's estate, receives the provision made for her in his will, she cannot, after seventeen years, claim that she did not intend to relinquish her dower.

In *Stilley v. Folger*, 14 Ohio, 610, it was held that the act of taking possession of the property within the time limited for making the election was not an election under the will. Indeed, it is said in that case, that the only mode of proving an election is by the record, unless the record is lost or de-

stroyed. This decision seems at variance with *Thompson v. Hoop, supra*, and numerous other cases, where an estoppel *in pais* was proven and held effectual; but, as applied to the facts of the case then before the court, where the acts relied on to create an estoppel were *within* the time limited by law for an election before the court, and when such acts did not amount to an actual conversion of the property, there is no inconsistency. In all the cases in which it is held that an *implied* election bars dower, the acts relied on are long continued, unequivocal, and inconsistent with the claim for dower. *Reed v. Dickerman*, 12 Pick. 146; *Delay v. Venal*, 1 Met. 57; *Upshaw v. Upshaw*, 2 Hen. & Munf. 381; *Ambler v. Norton*, 4 Hen. & Munf. 28; *Clay v. Hart*, 7 Dana, 1; *Craig v. Walthall*, 14 Gratt. 518.

We conclude, therefore, that the acts relied on as an election are not such as would have estopped her, had she been cited, as the law requires, from making her election in court after a full explanation of her rights under the will. These acts were within the time the statute gave her to choose, and they are not such as in equity create an estoppel.

The widow must, therefore, be deemed to have failed to make her election to take under the will. In such a case, the statute says she shall retain her dower and such share of the personal estate of her husband as she would be entitled to had her husband died intestate, leaving children.

The judgments of the courts below must, therefore, be reversed, and a judgment rendered in accordance with the foregoing decision.

As to the real estate:

The failure of the widow to take, under the will, left the real estate to vest in the devisees of the estate in remainder, subject to the widow's dower. Her death terminated her right to have dower assigned, or to claim any share of the accruing rents and profits. The will directs that the residue of the estate be distributed to the testator's heirs in such portions as his wife may direct by will or otherwise. She died without exercising this power. Having failed to make such distribution, the devise takes effect in favor of each of the

heirs or his legal representatives in equal shares. As the real estate vested in the residuary devisees, the rents and profits accruing after the testator's death vest in them also. This settles the right to the proceeds of the sale of the crop of corn.

As between the personal and legal representatives of John D. Smith, it belongs to the latter, but as the plaintiffs in error have no interest in this claim, the judgment of the court below in regard to this item is left undisturbed.

These heirs are the defendants in error in the second above case. This judgment is therefore affirmed.

D'ARUSMENT *vs.* JONES.

[4 B. J. Lea, 251.]

ADMINISTRATION ON ESTATE OF LIVING PERSON.

Letters of administration granted on the estate of a living person are void.

W. M. Randolph, for complainant.

Humes & Poston, George Gillham and Estes & Ellett, for defendants.

McFARLAND, J. The question in this case is the validity of an administration upon the estate of a living person.

The complainant files this bill to have satisfaction of four notes for \$1,000 each, executed to her by William C. Harrison on the 15th of January, 1861, and secured by a deed of trust on a tract of land in Shelby county, which she on that day had sold and conveyed to said Harrison. She states that soon after the date of said transaction she left the State of Tennessee, and resided for several years in the States of the North, and afterwards in Europe, returning to this State shortly before the filing of this bill, April 25th, 1874. Upon her return she dis-

covered that during her absence, to wit, on the 10th of August, 1869, the defendant, David Whitly, had procured letters of administration upon her estate from the county court of Shelby county, upon the pretext that she was dead, and as such administrator had filed a bill in the Chancery Court of said county against the personal representative and devisee of said Harrison (who had died) and the heir of the trustee in the deed of trust (who had also died) to have satisfaction of said notes, alleging that they had been lost or mislaid.

The cause was compromised, and a decree rendered in favor of said Whitly for \$3,500, upon condition that he execute a bond with surety to indemnify the estate of said Harrison, or the devisees of said land, to the extent of said sum of \$3,500, against all claims that might be set up by complainant, if alive, or by any assignee of said note. The bond was executed and the money paid. The prayer of the bill is to have satisfaction of the notes out of the trust property, but that Whitly and his sureties be held liable upon his aforesaid bond to the extent of the penalty thereof, in exoneration of the land.

It is conceded that the material allegations of the bill have been established, but it is maintained that Whitly acted in good faith and with due caution upon the belief that complainant was in fact dead, a belief justified by the fact that she had been absent for more than seven years, and the most diligent inquiries among her friends and acquaintances could discover no trace of her, and it is insisted for the defendant that the administration of Whitly should be held so far valid as to constitute a protection to innocent parties who in good faith paid to him money due the complainant.

A similar case has never before arisen in this State, so far as we know. It is a question that has recently attracted some attention. Previous to the decision of the Court of Appeals of New York, in 1875, in the case of *Roderigas v. East River Savings Institution*, 63 N. Y. 485, it seems not to have been doubted that such an administration would be absolutely void. Chief Justice Marshall said, such an act "all will admit is totally void." *Geffoth v. Frazier*, 8 Cranch; and there are numerous dicta and several decisions to the same effect. *Binson v.*

Ivey, 1 Yer. 306; *Allen v. Dundas*, 3 Term R. 125; *Wilson v. Frazier*, 2 Hum. 30; *Jochumsen v. Savings Bank*, 3 Allen, 87; Taylor on Evidence, vol. 2, secs. 1,490, 1,523. The case in 63 N. Y., before referred to, raises the direct question. Administration had been granted upon the estate of one who had been absent and not heard from for more than seven years, and money collected from his debtor. It turned out that he was not in fact dead, and the question was whether the payment made by the debtor was a protection against a second demand. The judges were divided in opinion—four to three—the majority holding the payment a protection. The decision has been severely criticised by Judge Redfield in 15 Am. Law Reg. It is fair, however, to say that the opinions present that side of the question with all its force, and show that at least something may be said in its favor. The argument may be briefly stated thus: Upon proof of death, the surrogate was compelled to act and grant administration. Proof of seven years' absence without being heard from was *prima facie* evidence of death which the surrogate might be unable to rebut, and therefore he was compelled to act, and grant the letters of administration. Armed with these letters, the administrator could demand payment, and the debtor could not resist, and therefore, it being a payment compelled by law, the debtor ought to be protected, especially as it is the acts of the supposed decedent in remaining absent without communicating with his friends for more than seven years that causes the injury, and consequently he, rather than the debtor, ought to suffer.

The decision, however, was to some extent placed upon the Statutes of New York, which were assumed to be peculiar in this respect, that is to say, before administration can be granted the fact of the person's dying intestate shall be proven to the satisfaction of the surrogate, who shall examine the person applying touching the time, place and manner of the death, and may examine any other persons, and for that purpose compel their attendance as witnesses.

While it is conceded that, in general, the finding by the court of the fact upon which the jurisdiction depends is not conclusive of the jurisdiction, yet it is maintained that, as in

this instance, the court was required to *hear evidence* and *determine* the facts, the determination must be conclusive until revoked, so far as concerns third persons, who had acted upon the faith thereof. It does not seem clear that an administration granted under such a statute would in this respect be different from administration granted under a statute simply authorizing the granting of administration upon the estates of deceased persons, but it is unnecessary in the present case to pursue this branch of the inquiry.

The force of the argument in favor of the validity of the administration seems to apply especially to a case of this character, when the assumption of death rests upon the fact of seven years' absence without being heard from, and the hardship of requiring a debtor who has recognized an administrator appointed under such circumstances liable to a second payment, seems peculiarly pointed. It must, however, be in principle immaterial what the proof of death may be as to the effect of the judgment, whether the court *find* or *assume* the fact of death upon proof of seven years' absence, or upon testimony of witnesses directly to the point, the question must be the same; that is to say, is the *finding* or *assumption* of the fact of death by the Probate Court conclusive until revoked by the same court, or reversed on appeal, for we have no statute authorizing administration to be granted upon proof of seven years' absence without being heard from. It is simply a common law rule of evidence, and it has no more force than any other evidence that may turn out to be untrue. Administration granted upon such evidence is no more lawful than if granted upon false testimony of witnesses. It may be the misfortune of the parties in interest in either case that for the time being they are unable to show the real truth. In such a case there *is* real hardship in requiring a debtor to pay the second time, but such is always the effect of holding, as courts are often compelled to do, that former judgments have been rendered without jurisdiction. The defendants in this case were unable to defeat the demand of Whitly, because they were, unfortunately, unable to prove the real truth. Such misfortune often occurs. The hardship to the debtor cannot be regarded greater than to hold

the creditor bound by an administration of his estate in his lifetime. To deprive him of his property and rights by a proceeding of this character, to which, by no sort of construction, can he be regarded as a party, is a violation of first principles. It is said, however, that it is the fault of the supposed decedent in remaining absent for seven years without communicating with friends that gives rise to the presumption of death and causes the injury, and he ought, therefore, to be bound by his own act. The seven years' absence may be willful, or it may be the result of insanity, imprisonment, or other misfortune. The failure of friends and acquaintances to be informed as to the residence of the absent one, or that he still lives, may be the result of accident, or other cause. In what cases the conduct of a person in remaining absent and conniving at the acts of a pretended administrator should be held fraudulent and an estoppel, it is unnecessary to inquire, as such is not the present case. Whitly, to whom administration was granted *as next of kin*, turns out to be in nowise related to complainant, and she could not have anticipated such a proceeding, or be held to have connived at it by remaining absent. A debtor, in a case like the present, could always obtain the indemnity which in this case was obtained, by applying to a Court of Chancery, that is a bond of indemnity against the contingency of the creditor returning alive, an indemnity that, perhaps, ought to be provided by statute, and there could be no more hardship in requiring the debtor to look to such a bond for indemnity than in requiring the creditor to do so. The money, when thus paid, should be recovered back, either by the debtor who has paid it, or by the creditor who returns alive, and if the security of the bond fail, it would be as great a hardship, to say the least of it, to require the creditor to lose it as to throw the loss upon the debtor. Therefore, the question of hardship is out of the way, and the fact that the administration was granted upon the proof of seven years' absence forms no exception to the general rule, and we return to the simple question, whether administration upon the estate of a living person is valid. Has a Probate Court, under our statutes, jurisdiction to grant administration otherwise than upon the estates of deceased persons?

Our statutes have not the supposed peculiarity of the statutes of New York. They simply authorize administration upon the estates of *deceased persons*, and if the person be not dead, the court would be acting *ultra vires* to appoint an administrator. But it is said the Probate Court has jurisdiction to ascertain the fact of death, and its judgment finding that fact is conclusive until revoked or reversed. The general principle is, that the jurisdiction being conceded, the judgment is conclusive of all matters involved, but if the jurisdiction be disproven, then the judgment is void for all purposes. If it be conceded that the jurisdiction rests upon the existence of a particular fact, then it will not do to say that the finding of that fact by the court is conclusive of its own jurisdiction, for this would be, to use a common expression, "reasoning in a circle." The judgment is conclusive, if the court has jurisdiction, and its judgment that it had jurisdiction is conclusive of the jurisdiction. There may be, in some cases, confusion as to what constitutes the jurisdictional facts, but this would seem to be about as clear an illustration of it as could be found. That a Probate Court has assumed that a certain person is dead, and has granted administration upon his estate, when in fact he was not dead.

A similar illustration is given by Chief Justice Marshall. He says: "If by any means whatever a prize court should be induced to condemn as a prize of war a vessel which was never captured, it could not be contended that the condemnation operated as a change of property."

The proper distinction is illustrated in the case of *Allen v. Dundas*, 3 Term Rep. 125, where it was held that payment to one named as executor in a forged will, which had been presented and allowed in the Prerogative Court, was a protection against the demand of one who had procured the proceedings on the forged will to be set aside and himself appointed administrator, *this*, upon the ground that the person *being dead*, the court had jurisdiction. But the judges said that if the person were not in fact dead, the whole proceeding would be void. So that the jurisdiction rests upon the *fact of death*, and this being clearly shown untrue, it must result that the entire pro-

ceeding was without jurisdiction and void. For at least it sounds almost absurd to say that any man is to be bound by the judgment of a Probate Court that he is dead. The argument that the court has jurisdiction to ascertain the fact of death is fallacious, for this must assume that the court may decide the question either way, and if it concludes that the person is not dead, then it has no jurisdiction for any purpose. While the court may hear evidence of the death, the fact is generally assumed, and if the court undertake to put its finding of the fact in the form of a judgment, it gives it no greater validity. This conclusion is sustained by the great weight of authority. The direct question was fully considered, in a case precisely similar, by the Supreme Court of Massachusetts, and this view held by the unanimous opinion of the court. See *Jochumsen v. Savings Bank*, 3 Allen, 87.

The principle is directly involved in the case of *Thompson v. Whitman*, 18 Wall. 457. By the laws of New Jersey it was made unlawful for any one not at the time a resident or inhabitant of the State, to gather clams, oysters or shell-fish in the waters of that State, and the law authorizes the seizure of the vessel and its forfeiture, which may be declared by any two justices of the peace of the county in which the seizure occurred. The suit was in the United States Court against the sheriff who had carried away the vessel.

The defense was the judgment of condemnation of two justices of the peace of New Jersey, *which judgment recites the fact that the vessel had been seized in their county*. This was held not conclusive, and it being shown that the seizure was not in the county, the judgment of condemnation was held void.

Our own case of *Wilson v. Frazier*, 2 Hum. 30, was where administration was granted in two different counties about the same time. Judge Reese said, "the letters granted in the county other than the county of the intestate's residence were void."

Other similar cases are referred to in the case of *Jochumsen v. Savings Bank*, 3 Allen, 87. If the judgment of the Probate Court as to the residence of the intestate is free from a

collateral attack, it can hardly be said that the judgment of the court as to the death of the party can stand upon a higher ground. In fact, so far as our researches have gone, the case of *Roderigas v. East River Savings Institution* stands alone, and even that decision seems to have been rendered doubtful upon a second hearing of the case. See 19 Am. Law Journal.

As a further argument against the validity of the administration, we need only see to what it would lead. If the administration was valid until revocation, as argued in the present case, then it must result that the decree of the Chancery Court in the bill filed by Whitly, to collect these notes, was likewise conclusive, for in that view it was a bill filed by one who was, for the time being, properly authorized to act as administrator to collect assets due the estate. The proper defendants were made, and the court had jurisdiction of the subject-matter, and the decree rendered in the cause must, in that view, be held conclusive upon all parties. But suppose the decree had been in favor of the defendants in the cause, that no such note had ever been executed, or that they had been paid, would the complainants in this cause be bound by the adjudication? Is it possible that she could thus lose her property and rights by a proceeding to which she was in no sense a party? The decree was, in fact, for only part of the debt.

Without attempting to further follow the discussion into refinements, it is sufficient to say that it will at least bring us back to the plain common sense view of the question, to which we think there is no sufficient answer, and that is, that there is no law for administering upon one's estate until after he is dead, and that no living man is bound by the *adjudication* of a court that he is dead. It might be different if we had a statute such as exists in Rhode Island, or such as the New York court seems to have construed theirs to be, providing that after an absence for a given time one's estate may be administered upon as if he were dead, subject only to his right to reclaim the proceeds, in the event he return. Even then it would be a question whether this would not be depriving a man of his property

without due process of law. See Albany Law Journal of May 15, 1880, p. 383. But, at any rate, we have no such statute.

We hold the entire proceedings void. We also hold Whitly and his sureties on his bond of indemnity liable, to the extent of the penalty, for the money received by him. The amount thus realized will be paid to complainant in exoneration to that extent of the trust property. 1 Lea, 586. It appears that some of the persons to whom Whitly distributed the funds have voluntarily paid to complainant part of the amount. An account of this, as ordered by the chancellor, will be taken, and the amount credited on the decree on the indemnity bond. Under the circumstances, we disallow interest during the war, and until June 1st, 1865, in accordance with our holding in similar cases, upon the ground that the parties were, for the time being, separated by the lines of the hostile armies, and occupied toward each other the relation of public enemies, between whom commercial intercourse was forbidden.

With this modification, the decree of the chancellor will be affirmed, and the cause remanded, and the costs of this court divided.

FREEMAN, J., dissenting: I am unable to agree with the conclusion reached by the majority of the court, for the following, among other reasons:

I think it a principle that runs through all our jurisprudence, that acts done by the parties having *prima facie* legal authority to do them, as to third parties, are valid. The party may not be able to make good his claim to the position assumed by him, or the authority claimed, when brought directly in question, and he may be declared not entitled to it, or his authority revoked, or declared invalid, yet as to third parties acting on the faith of the apparent authority, they are protected, and the acts done as valid as if the authority was complete, or the position assumed by the party one to which he had the legal right. The case of an officer *de facto* illustrates this principle. The party who is in an office, and who assumes its functions, whether he has authority by law to do so or not, may do all the acts incident to such office, and as to third parties, they are

held as valid and effective as the acts of an officer *de jure*. Surely the act of a court of competent jurisdiction ought to have equal validity and equal force, when the fact of want of jurisdiction does not appear on the face of its proceedings, as it does not in this case, but has to be made out by independent proof *de hors* the record. But this case is still stronger. On the facts as presented to the court at the time of granting the letters of administration, that is, proof of absence from the country for seven years, without being heard from, the court could not have refused to grant the letters of administration. Why? Because it had power to grant letters, on legal evidence of death of a party, and these facts constituted such evidence. When shown, the law said she was dead. It was legal proof of the fact. In law, the fact of death appeared to the court. If administration had been refused, the applicant could have appealed to the Circuit Court, and if refused there, on these facts this court would have reversed their action and compelled the grant. Is it possible that, on this state of facts, the act is void, and confers no authority? It might be, in such a case, that the letters would be granted on proof of a state of facts giving legal authority for the action of the court, and under a judgment of this, the court of last resort in the State, and that a judgment perfectly valid on its face, the only one the law allowed, and yet on the theory of the majority opinion, all the acts done under this judgment would be void, and third parties be held to have obeyed the judgment at their peril and in their own wrong.

Suppose the county court had refused to grant the letters on *procedendo* and mandate from this court, would not a mandamus be issued to compel them to do so? If on mandate to do so, after the right had been adjudged, the justices had refused to comply, would we not commit them for contempt? Most assuredly. Can we rightfully compel a court or any one else to do an act not authorized by law, but forbidden by it? If it be required by law, can it be void by the same law? If so, why, and by what process of reasoning is the conclusion reached? I am at a loss to see the reason. The opinion furnishes none. The act, then, of the court was legal when done.

If so, was not the authority conferred by it also legal? What was that authority? To collect the assets, the debts due the adjudged intestate, to enforce such collection by process of law, if necessary. He could then compel the payment of these debts in this case. If so, it was the legal duty of the debtors to pay, so that we have the strange conclusion, that what the law compels a man to do, is unlawful, and where the law imposes a duty, the performance is by the same law unlawful, and the act void. If this is not self-contradictory, and an argument that destroys itself, I am at a loss to see what would be. Whatsoever a proposition is stated, the opposite of which is a contradiction and absurd, we may be sure the proposition is true. So when we assert that of which the opposite is admitted to be true, we may be certain our proposition is false and unsustainable. Now we are compelled, on the theory of the opinion, to assert the act of granting the letters and payment by these parties was wrong, and yet admit that it was legal, and could have been compelled to have been by law, the court and the parties could have done nohow else. With all this, we now hold both acts void and illegal. The answer to this I am unable to see, and until I do, I must dissent from the conclusions based on such premises. In reply to the radical error in the opinion, as I think, that the court had no jurisdiction to grant letters of administration except on a dead man's estate, I need but say that the court had jurisdiction of the question, the subject-matter. Jurisdiction is conferred by law. Whether the facts on which the jurisdiction could be exercised depends on these being made to appear by proof. That was a matter for the judgment of the court acting on the facts before it. The proof may not have been sufficient, but we are not revising that judgment, and therefore called on to weigh it. But, as I have shown, the case was made out, and on the facts the authority for its action was complete, and therefore the act, when done, was the only legal judgment that could have been rendered. This being so, on even the principle of the opinion, that in a case of death of a party the court had legal authority to act, because the death was legally proven. Yet this act is held void, by reason of subsequent proof developed, and the

effect declared to render all who acted under this authority illegal and void. This involves the proposition that a third party is to obey the judgment of a court of competent jurisdiction, valid on its face, at his peril, that peril being that it may turn out the proof was not sufficient, or after proof may show that the court erred in what it did. This principle would be subversive of all sound policy, and compel every man to guarantee the correctness of the action of the judicial tribunals of the country. Surely, the citizen ought to have some benefit from the generally conceded legal presumption in favor of the regularity of their action. The result I would reach is, that the subsequently developed facts furnish the ground for vacating or revocation of the letters, but being granted properly at the time, all acts done under authority should be held valid.

This, it seems to me, is more in accord with sound legal analogies, and better agrees with a wise public policy. In support of this, I suggest that such cases are rare, this being the first in this court since the existence of our State, eighty odd years. They can never occur without more or less neglect of attention to property and interest on the part of the claimant. Such neglect, and such protracted absence, without notice of whereabouts, furnishes in law the ground for such an administration. The party must be assumed to have acted with a knowledge of the law on this subject, and having made the case by his own negligent conduct, ought not to be allowed to aver the action of others on the fact as a wrong. The principle is that no man can assign the result of his own conduct as a legal wrong, much less hold third parties responsible for such results. This is a self-evident proposition. The theory of the majority opinion is that it may be done.

Which ought to suffer, the party who has contributed at least in some degree to the injury, or parties wholly innocent of all wrong? In fact, it may be maintained that the present complainant has made out, by her own conduct, the entire case, requiring the action of the county court and the grant of the administration. What she did had authorized it by law. Yet she is now allowed to come in and make innocent third parties,

who acted under the facts as she made them, suffer heavy loss for her gain. To this I cannot assent.

McFARLAND, J., upon petition to rehear, said: We have been asked to rehear this case on account of its novelty. The only additional argument offered is a review of the question in the *American Law Review*, of May, 1880. This article concedes that the weight of authority is in favor of our conclusion, and refers to additional authorities in its support that we have not had access to. *Moore v. Smith*, 11 Rich. Law (S. C.), 569; *Melia v. Simmons*, 45 Minn. 334. The author only undertakes to say that something may be said on the other side of the question, and puts forth, somewhat doubtingly, the suggestion that the jurisdiction does not depend upon the fact of death, but upon the allegation of the fact in the application for letters of administration.

If disposed to enter further with the discussion, we think it could be shown that this position is unsound. But we are content to rest our conclusions upon the reasons and authority already given.

The other points in the petition have been fully considered in the foregoing opinion.

As to the interest after June, 1865, while it is true that complainant was absent with the notes in her possession, so that they could not have been paid, yet it is not shown that the defendants were ready or desired to make payment, or that they lost the interest.

Petition to rehear dismissed.

See *Melia v. Simmons*, 1 Am. Prob. R. 143, and cases in note.

COLLIER vs. GRIMESEY.

[36 Ohio State, 17.]

DEVISE OF "PROFITS AND BENEFITS" NOT A FEE.—EXECUTION OF POWER BY EXECUTORS WHEN ALL DO NOT QUALIFY.

Testator devised the sole use of certain real estate to his wife so long as she remained his widow, and at the time she ceased to be his widow the "profits and benefits" of such real estate to be equally divided between his children and grandchildren, adding a direction that when his son Samuel attained majority, said real estate should be sold—provided his wife's widowhood was ended—and the proceeds divided amongst the same beneficiaries. He named executors, directing them to "act and see the accomplishment of" his will. *Held:*

That by the words "profits and benefits" the testator did not intend to devise a fee.

That the direction to sell was imperative; and the time of sale after Samuel became of age and the widow's estate ceased.

That the duty of making the sale devolved on the executors, and as one declined to qualify the other should execute the same.

THE plaintiff, Maria Collier, is the half-sister, on the part of her mother, of Oris M. Painter, deceased, and as such is the sole distributee of his personal estate. The object of the petition is to enforce a trust alleged to arise under the fourth item of the will of Samuel Painter, deceased.

The following is a copy of the will:

"Whereas, I, Samuel Painter, of Perry township, in the county of Columbiana, and State of Ohio, being of a sound and disposing mind and memory, do make this my will, *hearby* revoking all other will or wills *heartofore* by me made, this *onely* to be and remain my last will and *testimoney* in manner, as follows:

"1st. I direct my funeral expenses *and* and all my just *depts* to be paid.

"2d. I bequeath to my two sons and grandson, nameley, Seth Painter, Samuel Painter, and Oris M. Painter, a certain tract of land, being and lying in *Vanwart* county, in the State of Ohio, containing three hundred and thirty-two acres and seventy-six hundredths, *wich* land I hold by patent from under the hand of Martin Van Buren, president of the United States,

dated twenty-first day of August, eighteen hundred and thirty-seven, to them and their *heirs*, for ever to be *equally* divided between them, one hundred and eleven acres each.

"3d. I bequeath to my three daughters, *namely*, Louise Thomson, wife of John Thomson, Lucinda Grimesey, wife of John Grimesey, and Lydia Ann Painter, a *certain* tract of land lying in Goshen township, *Mahoning* county, State of Ohio, containing thirty-two acres, to be *equally divided* between them according to value.

"4th. I will and bequeath to my wife Mary, the *hold* and *sold* use of all my *real* estate not *heretofore bequeathed*, so long as she remains my widow, and at the time she *seeth* to be my *widow*, the *profits* and benefits of the above said *real* estate shall be *equally divided* between my six children and my grandson Oris Painter, share and share alike.

"I direct that when my son Samuel Painter shall *arrive* at the age of twenty-one years, that the above *mentioned* real estate shall be *sold* (provided that my wife's *widow-hood* shall have *seth* before that time), and to be *divided* between them as follows: Seth, Samuel and Oris two shares each, and the rest of my children one share each.

"And *lastly*, I constitute, *nominate* and *appoint* my son Seth Painter, and my son-in-law John Grimesey, my executors, to act and see the accomplishment of this, my last will and *testimony*, *according* to the true intent and *meaning* thereof. In witness *thereof*, I *hereunto* set my hand and *seal* this thirty-first day of August, in the year one thousand eight hundred and *fourty-eight*."

The testator at the date of his will was in the 60th year of his age, and he died July 29, 1851. His will was duly admitted to probate in the same year, and letters testamentary were granted to John Grimesey—the other executor named, Seth Painter, declining to accept the trust. The widow elected to take under the will. At the date of the will she was fifty-five years of age; and the testator's son, Samuel, was, at that time, in the 9th year of his age.

The widow's estate determined on May 18, 1874, by her death. The testator left six children surviving him, and his

grandson, Oris M. Painter, who was a son of a deceased son of the testator. Oris died September 17, 1864, intestate, and without issue, leaving the plaintiff his half-sister, as before stated.

The petition states that all of the legatees named in the fourth item of the will, except Oris, "conveyed away their interests in said premises, under said will, by deeds in fee, and that the defendant, John Pow, holds said interests, and is now in the possession of the same."

The petition also avers, "that said real estate was devised to be sold by said will, and the proceeds to be divided among the legatees, and thereby became personal property, and that on the death of said Oris M. Painter, all his personal estate descended to plaintiff as his sister of the half blood, including his interest of one-fifth in the real estate aforesaid, and that she, the plaintiff, is the owner of all said Oris M. Painter's interest in said lands."

The plaintiff prays, in substance, for the sale of the premises by the executor, and for general relief.

John Grimesey, the acting executor, and John Pow, are made defendants.

In the Court of Common Pleas the case was heard on petition, answer and reply, and a decree was rendered for the plaintiff.

On appeal the defendants on leave withdrew their answer, and each filed a demurrer to the petition on the ground that there was a defect of parties, and also on the ground that the facts stated did not constitute a cause of action.

On the motion of the defendants the cause was reserved for decision by this court.

Clarke & McVicker, for plaintiff.

Kennett & Ambler, for defendants.

WHITE, J. The main controversy depends upon the construction of the fourth item of the will. The question is whether the sale of the lands therein provided for, is directed

to be made on the arrival of Samuel at the age of twenty-one years, *and* after the termination of the estate of the widow; or, whether the direction to sell is made contingent on the widow's estate terminating *before* Samuel's arriving at age. The claim of the defendants is that the power of sale is thus contingent; and, hence, that as Samuel became of age before the determination of the estate of the widow, the provision directing a sale and the division of the proceeds ceased, on his arriving at age, to be operative. They further claim that on the determination of the estate of the widow, the fee of the land passed to the children and grandson of the testator, under the devise of the "profits and benefits" of the real estate. We do not question that a devise of the rents and profits, or of the "profits and benefits" of lands, without qualification or limitation will impliedly carry the fee. But in order to determine whether there is such qualification or limitation, we must look into the whole will, with the view of ascertaining the sense in which the terms were used by the testator; and when such sense is ascertained to give it the effect intended. Such terms cannot be held to carry the fee when it appears from other parts of the will that the fee is otherwise disposed of.

Whether the fee is otherwise disposed of, in the present case, depends upon the clause in item four, already referred to, directing the land to be sold.

The clause not only directs a sale, but it makes a disposition of the proceeds of the sale. It provides that the proceeds of the sale shall be divided between the children and the grandchild as follows: To Seth, Samuel, and Oris, two shares each, and to the rest of the children one share each. According to the claim of the defendants, the bequests of *two* shares each to Seth, Samuel and Oris are made contingent upon the estate of the widow terminating *before* Samuel became of age. If her estate ceased a day before he became of age, the land was to be sold, and Seth, Samuel and Orris were each to have two shares of the proceeds. But if the widow's estate should cease a day after Samuel became of age, there was to be no sale, and these bequests were not to take effect.

That such was not the intention of the testator seems to us

to be clear. The object of the testator in postponing the sale until his wife's widowhood should cease, was, it seems to us, to preserve to her, during her widowhood, the use of the land; and that the following is the true reading of the clause: "I direct that when my son Samuel Painter shall arrive at the age of twenty-one years, that the above-mentioned real estate shall be sold, provided that my wife's widowhood shall have ceased before that time," that is, before the making of such sale.

The provision in the preceding clause, directing "the profits and benefits" of the land to be divided equally between his children and grandson, is not without effect upon the construction we give to the subsequent clause. That provision was intended to dispose of the use or annual rents and profits of the land for the period that might intervene between the termination of the widow's estate and the sale, whether her estate ceased before or after Samuel became of age.

The direction to sell the land is imperative, and, it seems to us, the duty of making the sale is imposed on the executors. There is no discretion vested in them whether the lands shall be sold or not. The direction is that the real estate shall be sold, and the proceeds of the sale divided among the persons designated.

The bequest is of money, the proceeds of the sale of the land, and not of the land. The beneficiaries under the will take the property with the character impressed upon it by the testator. In the present case they take it as money, and in the character of pecuniary legatees; and the fact that Oris died before the time arrived for making the sale did not change the nature of the bequest. His interest became vested at the taking effect of the will, and, on his death, his right passed to his personal representatives. *Reading v. Blackwell*, Baldw. C. Ct. 166; *Rinehart v. Harrison's Ex'rs*, Id. 177.

That the testator intended that the sale of the land and division of the proceeds should be made by the executors, is shown, we think, by the language used in the last clause of the will. He appoints his son, Seth Painter, and his son-in-law, John Grimesey, his executors, and directs them to "act and see the accomplishment of this my last will and testament, accord-

ing to the true intent and meaning thereof." It seems to us the testator could not have intended to devolve the making of the sale and distribution of the proceeds upon his heirs; but that he regarded this as a matter to be accomplished by his executors.

As one of the executors refused to act, the duty of executing the trust devolved, under the statute, upon the other executor. S. & C. Stat. 1629, § 65.

The remaining question is, whether there is a defect of parties. As the interest vested in Oris is to be regarded as personal estate, his personal representative ought to be made a party. He died intestate; hence, if there has not been, there ought to be an administrator appointed of his estate, so that, to the extent that may be necessary, the money belonging to his estate may be applied to the purposes of administration.

The interests acquired under the will by the other legatees having been, by them, vested in John Pow, he is the proper party to represent such interests.

If the property in question could be considered as land devised to Oris, it would have descended from him as ancestral property to those who were of the blood of the testator from whom the estate came. But as it must be regarded as of the personal estate of Oris, while the heirs may have been proper, we are not prepared to say that they are necessary parties.

The demurrer, on the ground that the petition does not show a cause of action, is overruled; and as to the ground of there being a defect of parties it is sustained.

Devise of rents and profits.—"To have the issues and profits and to have the land is all one." *Parker v. Plummer*, Cro. Eliz. 190; *a. p. Stewart v. Garnett*, 3 Simons' R. 898; *ex-parte Elliott*, 5 Whart. R. (Penn.) 524; *Sampson v. Randall*, 72 Me. R. 109; and a similar effect is given to a devise of the "net income," or "net profits." *Earl v. Rowe*, 85 Me. R. 414.

So of a bequest of the income or interest of personal property, whether such income or interest be bequeathed through an executor or a trustee, or directly to the beneficiary. *Ward v. Amory*, 1 Curtis' C. C. R. 419, 428.

But, at common law, where it appears that the rents are to be paid to the beneficiary by the executor or trustee, as where the executor was directed

"to lease the term and pay over the rent to the testator's poor kindred to whom such profits were devised, the title to the term was in the executor as trustee." *Per* Walworth, Ch., in *Craig v. Craig*, 3 Barb. Ch. R. 76, 96. See, also, *Paterson v. Ellis*, 11 Wend. R. 259, *per* Edmonds, S. p. 298.

The same rule applies to the income of personal property. *Ward v. Amory*, *supra*.

If it appear doubtful whether a devise of real estate or of its use only was intended by a testator, the former construction should, it seems, prevail. *Paterson v. Ellis*, *supra*, p. 298.

A devise of rents and profits for a limited period is a devise of the land for the period specified. *Cooper v. Pogue*, 92 Penn. St. R. 254; *Fay v. Fay*, 1 Cush. R. 98; see *Bentley v. Kauffman*, 86 Penn. St. R. 99; *Mandlebaum v. McDonell*, 29 Mich. R. 78; 18 Amer. R. 61.

Implied power to executors to sell land.—Where a will naming an executor contains a direction that real estate be sold, yet intrusts to no person expressly the duty of selling, this duty will be deemed impliedly cast upon the executor if the will intrust to him the distribution of the fund to be produced by the sale (*Lockart v. Northington*, 1 Sneed. R. 818; *Mandlebaum v. O'Donell*, 29 Mich. R. 78; 18 Amer. R. 61); or if the will unite in a common disposition, such fund and the testator's personalty. *Gray v. Henderson*, 71 Penn. St. R. 368.

Thus, where a will read as follows: "I wish all my debts to be as speedily paid as possible, for which purpose I desire that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose, and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object," no person being named to make the sales, but executors appointed, it was said that the power to sell "is a power vested in them by necessary implication. The land is to be sold for the purpose of paying the debts, which is a duty devolving upon the executors; and it follows, as a matter of course, that the testator intended his executors should make the sale to enable them to discharge the duty and trust of paying the debts." *Peter v. Beverly*, 10 Peters' R. 533, 565; see also *Blount v. Moore*, 54 Ala. 360.

A testator directing so much of his real estate as necessary to raise certain legacies to be sold at public vendue, when his children should become of full age, and the remainder of the real estate "to be leased or rented" by his executors, and upon the majority of the youngest child, all real estate not otherwise disposed of to be sold, and the proceeds, with the amount of the personal property, divided among the children, Chancellor Kent observes: "I think it is a very necessary conclusion that the executors were the persons intended by the testator to execute the power to sell," speaking particularly, it would seem, of the power to sell to pay legacies. *Davoue v. Fanning*, 2 Johns. Ch. R. 252.

Some stress was, in the opinion of the chancellor, laid on the circumstance of a sale at public auction being directed. But this direction ought not apparently to have influenced the decision. "It has been settled law since the

Year Books," remarks Nelson, Ch. J. in *Bogert v. Hertell*, 4 Hill's R. 492, 500, "that a power given in a will to sell land for the purpose of paying debts and legacies, or for making division of the produce without naming the donee, will vest in the executor by implication."

In a later New York case a will directed after death of testator's wife a sale of land and division of the net proceeds among certain persons. Some of those entitled to these proceeds were aliens, incompetent, as the law of the State then was, to take real estate by devise. No donee of the power being named, a power to the executors was held to be implied, "because the fund raised is distributable by them in that character." As no event had occurred which rendered the purposes of the sale unattainable, "the purpose of the sale for the convenience of division and to enable the aliens to take still continued," *Meaking v. Cromwell*, 5 N. Y. R. 136, 143.

So far as the mere convenience of division affects the question, it is worthy of remark that in *Lovett v. Gillender*, 35 N. Y. R. 617, Davies, Ch. J., remarks of a power of sale given to executors merely for the purpose of division that "as the law made that division upon the death of the testator, the provision is inoperative and has nothing to support it." See 35 N. Y. R. p. 628. But see *Kinnier v. Rogers*, 42 N. Y. R. (Hand), 581. In a North Carolina case, it is said that "a simple direction in a will to *divide* an estate real and personal is by no means a direction to *sell* the real estate for division." *McDowell v. White*, 68 N. C. R. 65. See *Alexander v. Wallace*, 8 Lea's R. 569. It has been held in Massachusetts that a bequest of "all the residue of my estate, both real and personal, of whatever name or nature soever or wherever said property may be found," with a direction to the executor "to *collect* all the last above specified property as soon as can be done consistently without sacrificing too much by forcing the sale thereof in any improper manner, not however to exceed the term of five years, and pay over the same," vests by implication a power to sell the real estate in the executor. *Going v. Emery*, 16 Pick. R. 107; 26 Amer. Dec. 645. See *Hamilton v. Hamilton*, 98 Ill. R. 254. And in New Jersey the same inference was drawn from the following clause in a will: "I appoint my beloved and trusty son * my sole executor of this my last will and testament. My will and wish is to consult the heirs, whether it will be best to sell it or otherwise—the homestead property." *Haggerty v. Lanterman*, 30 N. J. Eq. R. 87. But a strict rule against the implication where there was no charge on the land in favor of legatees, and no duty of paying over proceeds imposed upon executors, was applied in *Doe ex dem. Dunlap v. Pyle*, 5 McLean's R. 322.

In equity a charge of legacies on the land gives a power of sale by implication to the executor. *Whitehead v. Wilson*, 29 N. J. Eq. R. 396, citing *Greetham v. Colton*, 34 Beav. R. 615, 619; s. v. In the Matter of the Will of Fox, 52 N. Y. R. 530, 537. But at law, a devise "after all my just debts are discharged," it has been held, gives no such authority. *Den ex dem. Dunn v. Keeling*, 2 Dev. (N. C.) L. R. 288.

A power to executors "to sell and dispose of so much of the real estate as should be necessary to fulfil the will," would empower them, it seems, to

lease for twenty-one years real estate, consisting of vacant lots, it appearing that to do so would greatly and permanently increase the value of the lots to the benefit of the *cestui que trust* for life and the vested and contingent remaindermen, the greater power including the less. *Hedges v. Riker*, 5 Johns. Ch. R. 168.

Power of acting executors to exercise power to sell land.—The preamble to chapter IV, of 21 Henry VIII, sets forth that "sundry persons before this time having other persons seised to their uses of and in lands and other hereditaments to and for the declaration of their wills, have, by their last wills and testaments willed and declared such their said lands, tenements, or other hereditaments to be sold by their executors as well to and for the payments of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, as also for other charitable deeds to be done and executed by their executors for the health of their souls," and that while some of the executors were ready to act yet, continues the preamble, "the residue of the same executors uncharitably, contrary to the trust that they were put in, have refused to intermeddle in any wise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator," and that "after the opinion of divers persons," such sales must be made by all the executors, so that debts are left unpaid and legacies and bequests unperformed, "as well," concludes the preamble, "unto the extreme misery of the wife and children of the said testator, as also unto the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God;" it is therefore enacted that where part of the executors refuse and the residue accept, sales, theretofore or thereafter made by such residue, should be as good and effectual as if all had joined.

This ancient statute passed, as would be apparent from the commencement of the preamble (see 3 Washb. on Real Prop. B. 111, c. VI, § 1) is the original of the Ohio statute referred to in the principal case, and of enactments of like purport in other States.

The operation of the Ohio act extended expressly to cases where some of the executors "die, refuse to act, or neglect;" the New York statute in terms to cases only where "any executor shall neglect or refuse to take upon him the execution" of the will. 2 Rev. Stat. 109, § 55; *Davoue v. Fanning*, 2 Johns. Ch. R. 252.

Instances coming within these statutes are those in which the power is vested in the executors in their official capacity. *Conover v. Hoffman*, 1 Bosw. R. 214. Where "there are no words in the will warranting the conclusion that the testator intended for safety or some other object a joint execution of the power, as the office survives, the power ought also to be construed as surviving." *Peter v. Beverly*, 10 Pet. R. 532.

At common law a devise that executors shall sell, gives a power only, while a devise to them to sell passes the interest in the land. *Rogers v. Marker*, 12 Heisk. R. 645. By its terms the statute of Henry VIII embraced only devises of the former class, "yet," observes Coke, "being a beneficial

law, it is, by construction, extended where lands are devised to executors to be sold." Coke, Litt. 118 a.

Although the words of the statute are that executors "have refused to intermeddle," no express refusal or formal renunciation by an executor is essential to render valid conveyances by his associates. Forbearance from entering upon his duties when the will is proved, is presumptive evidence of a refusal to accept the office. "When a man confides to another the management of his estate, after his decease, the nature of the office calls for prompt action." Wood v. Sparks, 1 Dev. & B. L. R. 389. See, also, Marr v. Peay, 2 Murphey's R. 84; 5 Amer. Dec. 521.

The same doctrine is said, in Wood v. Sparks, to prevail in Virginia.

Whether the statute embrace powers of sale left to the discretion of executors, or is confined to peremptory directions to sell, is a question upon which the decisions in the various States are in conflict.

The latter construction is disapproved by the New York Court of Appeals as "a strict and narrow construction of a remedial and beneficial statute," and an intimation in Jackson *ex d.* Cooper v. Given, 16 Johns. R. 167, favorable to such construction, is condemned. Taylor v. Morris, 1 N. Y. R. 241. "After bestowing some pains upon the search," observes Ruggles, J., p. 353, "I have not been able to find any English adjudication or dictum that the operation of the statute 21 H. VIII, c. 4, is limited to the case of a peremptory order to sell."

The judge delivering the opinion of the court, supports his view by Zebach's lessee v. Smith, 3 Binney, 69; Chanet v. Villeponteaux, 3 McCord's South Car. R. 29; Wood v. Sparks, *supra*; Brown v. Armistead, 6 Rand. R. 594; but in Kentucky it is admitted the other construction has been adopted. Wooldridge v. Watkins, 8 Bibb's R. 349; Clay v. Hart, 7 Dana's R. 1.

See as favorable to the New York decision, Weimar v. Fath, 14 Vroom's R. 1; Miller v. White, Taylor's R. 309; 1 Amer. Dec. 591; Nelson v. Carrington, 4 Munf. R. 332; 6 Amer. Dec. 519. But in conflict with these are Bartlett v. Sutherland, 24 Miss. R. 395; Tarver v. Haines, 55 Ala. R. 503 (compare Leavens v. Butler, 17 Ala. R. (O. S.) 380, 394).

Equitable conversion.—On this subject see Craig v. Leslie, 3 Wheat. R. 563, 577; Seymour v. Freer, 8 Wall. R. 202; Bogert v. Hertell, 4 Hill's R. 492. To work a conversion, the direction to sell must be imperative. In the Matter of the Will of Fox, 52 N. Y. R. 530, 537. See Tazewell v. Smith, 1 Rand. R. 313; 10 Amer. Dec. 533; Shaw v. Chambers (Mich.), 14 Repr. 50. The will, however, need not be expressed peremptorily if it clearly convey the testator's intention that the land be sold. Ropp v. Minor, 33 Gratt. R. 97. The persons interested may elect to take the land instead of its proceeds. Jones v. Caldwell, 97 Pa. St. R. 42; Hetzel v. Barber, 69 N. Y. R. 1, 11. But an infant cannot elect. Ashby v. Palmer, 1 Mer. R. 296. Nor may one tenant in common elect alone. Bradish v. Gee, Ambl. R. 229.

BLIVEN, EXECUTOR *vs.* SEYMOUR.

[88 New York, 469.]

WHEN LEGACY SPECIFIC.—CONSTRUCTION OF BEQUEST.—ANNUITY PAYABLE OUT OF PRINCIPAL ON DEFICIENCY OF INTEREST.

The fact that a specific legacy of a gold watch to one of testator's daughters immediately precedes a gift of thirty-five dollars in money to another daughter, both children receiving equal provision in other clauses of the will, does not raise a presumption of an intent to make the money legacy specific also.

Testator gave to his two daughters the use of \$1,000 each, directed "the principal to go to their children respectively," expressing the wish that the \$1,000 "devised" to his daughter A., in case of her death, leaving no child living, should go to E.'s children, but if A. died leaving children, the latter were to have the use of the same, and when the youngest attained majority the same to be paid to said children. *Held*, that the language defined the previous gift of \$1,000, though the word "devise" was inaccurately used; that the bequest to E.'s children was not repugnant to the previous gift to A.; that there was no trust nor illegal suspension of the power of ownership.

Testator gave one-half of his residuary estate to E., the other half "to be put at interest," and \$100 a year paid to A. in person annually, the first payment to be made one year after testator's death. E. was then made general residuary legatee. *Held*, that the annuity was not limited to the interest merely, but A. was entitled to the full amount specified, to be made up out of principal, if the interest was insufficient.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 3, 1881, which affirmed a judgment entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as executor of the will of Sidney Janes, deceased, to obtain a judicial construction of said will. The testator died in February, 1878, leaving his widow and two daughters, Emily Seymour and Amelia Crumb, surviving; both of the daughters had children then living.

The clauses of the will which are in question are as follows:

"I give to my wife Rhoda, in case of her becoming my widow, the use of the premises on which we now reside, and all of the household goods of which we are now possessed and own, to have and hold for her own use and benefit during her lifetime, after which one-half of the same is to go to my

daughter Emily, wife of Benjamin Seymour; and I further give to my wife \$500 in money—\$500. I give to my two daughters, Amelia, wife of Dr. D. W. Crumb, and Emily, above named, \$1,000, each, to be put at interest and there kept, during their lifetimes, and they are to have the use thereof, then the principal to go to their children respectively each. I give to my daughter Amelia one gold watch; the same is in my possession and was bought for her. I give to my daughter Emily \$35 in money. I wish my executors hereinafter named to obtain and set four sets of headstones, as follows: one to the grave of my wife Mary, one to the grave of my daughter Anbernett, one to the grave of my wife Abiah, and one to my grave; good, common, respectable headstones, all. And when the foregoing provisions shall have been completed, which I wish to have done as early as propriety shall indicate, and all dues and expenses paid, then whatever of property or value I may have left, I wish one-half of it to go to my daughter Emily, aforementioned, and the other half together with the one-half of the proceeds of the premises and household, the use of which is devised to my wife, to be put at interest. I further give to my daughter Amelia, aforementioned, \$100 a year, to be paid to her in person annually, and the first payment thereof to be paid to her one year after my death. Of the \$1,000 devised to my daughter Amelia, in case she should die not leaving any child or children living, then the \$1,000 I wish to have to go to my daughter Emily's children, but in case she dies leaving child or children, then the child or children are to have the use, and when the youngest shall come to his or her majority, or of age, not longer being a minor, then the same to be paid over to said child or children, and if my daughter Amelia should die, leaving any money or property arising out of the money payments devised in this will, then said money or property is to go to my daughter Emily. And I hereby make my daughter Emily the residuary legatee of any and all matters of value."

George W. Ray, for appellants.

R. A. Stanton, for respondents.

FINCH, J. It is to be regretted that an estate so small as that here in controversy should be further lessened by a litigation, both long and severe; but the contest may have been unavoidable; and in any event the questions presented must be carefully determined without reference to the amount involved. The will to be construed is quite confused, and very inartificially drawn, and makes any effort to ascertain the intention of the testator somewhat difficult and unsatisfactory. We may best examine it by considering in their order the objections taken by the appellants, and the construction of separate provisions for which they contend.

The will contains a bequest in the following language: "I give to my daughter Emily \$35 in money." Immediately preceding this was a specific bequest to the other daughter, Amelia, of a gold watch, which was in testator's possession, but was bought for her; and still earlier in the order of the will, a bequest of the use of \$1,000 to each of the said daughters. The appellants insist that the bequest of \$35 is a general legacy, and so subject to abatement, while the respondents contend that it is intended as specific and not to be abated. The courts below have concurred in the latter opinion. The only ground suggested is the hazardous inference that because a specific legacy of a watch had just before been made to the one sister, the money given to the other was intended to balance it, and to be paid in full and without abatement. The suggestion is perhaps probable, but founded upon no language of the will, and straying from the ordinary rules of construction. The gift is simply of so much money. It is not of any particular sum, or even out of any described fund. Any money of the estate would discharge it, and whatever we may imagine was the unuttered and unexpressed wish or purpose of the testator, we cannot disregard the thing which he has said, and put in its place the thing he did not say. The question is very unimportant in amount, but it may come to us again with large consequences behind it, and we must not establish a precedent by which a general legacy of money, plainly and unequivocally expressed, becomes in effect a specific legacy, because we can see that the testator might very naturally and

justly have made it so. It could not have been adeemed; it was not even demonstrative; and was general and not specific. And though a general legacy may sometimes have a preference over other general legacies in the same will, it is only in certain recognized cases. Where it is given for the support and maintenance of a near relative, otherwise unprovided for (*Scotfield v. Adams*, 12 Hun, 370), or for the education of such relative (*Petrie v. Petrie*, 7 Lans. 90), or where it is in lieu of dower and so may be deemed a purchase-price (*Blower v. Morret*, 2 Ves. Sr. Ch. 421), such general legacy has been granted a preference. No such fact raises the question here. The will is bare of any such suggestion, and we are left with only the probable guess that because a watch was given to one legatee, the gift of money immediately following to another legatee, was intended to operate as specific although expressed as general. We cannot assent to that construction, especially in view of the fact that in doubtful cases the courts lean against a construction which makes the legacy specific. (*Foot's Appeal*, 22 Pick. 299.)

The next questions raised are over the bequest of the use of \$1,000 to the testator's daughter Amelia. His language is, "I give to my two daughters, Amelia, wife of Dr. D. W. Crumb, and Emily, above-named, \$1,000 each, to be put at interest and there kept during their lifetimes, and they are to have the use thereof, then the principal to go to their children respectively each." So far nobody criticises the bequest. The life estate to the daughters with remainder over in each case is plainly expressed. But after a series of other bequests the possible death of Amelia's children before the termination of the life estate seems to have occurred to the testator, and he returns to the subject of this bequest, and provides for the emergency, thus: "Of the \$1,000 devised to my daughter Amelia, in case she should die not leaving any child or children living, then the \$1,000 I wish to have to go to my daughter Emily's children; but in case she dies leaving child or children, then the child or children are to have the use, and when the youngest shall come to his or her majority, or of age, not longer being a minor, then the same to be paid over

to said child or children." It is over this provision that the main controversy has arisen. It is said, *first*, that the legacy of \$1,000 is not described because the testator speaks of it as "devised." That is purely a verbal criticism. That the word is used inaccurately does not alter the distinct reference to "the \$1,000," the use of which had been previously given to Amelia. The criticism then strikes upon the word "wish," in the bequest over. It is plainly used in the same sense as if he had said I will, or I direct. A failure to use appropriate technical language, or a misapplication of legal terms, will not defeat an intention clearly manifested and sufficiently disclosed by an examination of the will itself. (*Parks v. Parks*, 9 Paige, 107; *DeKay v. Irving*, 5 Denio, 646.) It is then said that the bequest over to Emily's children is repugnant to the gift previously made to Amelia for life with remainder to her children. There is no inconsistency in the two provisions. Read together they constitute a bequest often found in the books; to one for life, with remainder to children and a limitation over in case of their death. The argument addressed to us on the ground of repugnancy would tend to make it impossible ever to vest an estate in one, subject to be divested by his death, and carried over to a new or substituted ownership. The gift to Amelia's children is qualified by the limitation over in case of their death, and is to be treated as a single bequest to such children, with its character and extent defined. The next objection urged is, that the gift is void as suspending the absolute ownership for more than two lives, and the argument goes largely upon the ground that the fund, as a whole, was vested in the executors as trustees, and such trust would not terminate until after the death of the wife, and the arrival at full age of the youngest of an unknown number of children. But there is here no trust. No attempt to create one has been made; there is not even an express gift to the executors. Nothing whatever is required of them which they may not do as executors and by virtue of the power impliedly conferred. They hold as executors merely, performing their duty as such without taking a trust estate. (*Gilman v. Reddington*, 24 N. Y. 18; *Williams v. Conrad*, 30 Barb. 524; *Martin v.*

Martin, 43 id. 172; *Burke v. Valentine*, 52 id. 412; *Everitt v. Everitt*, 29 N. Y. 72; *Tucker v. Tucker*, 5 id. 408.) And this is more especially true where we are asked to raise a trust by implication which is not only unnecessary, but would be void when created. (*Smith v. Edwards*, MSS., Feb. 1882.) It is then further said that Amelia's children take as a class and not in severalty, because no separate shares are specified, and there is no gift over of any part. That consideration is very important in a case where a trust exists which may be construed, either as single, and covering the whole fund, or as an aggregate of separate and several trusts for the benefit of each legatee. But where a life estate is given to a widow, with remainder to the children, and such remainder vests at once upon the death of the testator, the children take as tenants in common, and the proper share of each vests in each. Such is the express provision of the statute as to a grant or devise of real estate (1 R. S. 727, § 44), and the same rule is applicable to a bequest of personalty and must be so applied. (*Everitt v. Everitt*, 29 N. Y. 72.) The children of Amelia living at the death of the testator took distributively, and the share of each vested at once, subject to the life estate of the mother, and liable to be divested by death in her lifetime. The case is one of a gift *in presenti*, with the period of payment postponed. (*Smith v. Edwards*, *supra*.) And that furnishes the answer to the further contention, founded on the postponement of payment to Amelia's children until the youngest should reach its majority, they, however, receiving the whole interest until payment. Their legacy vested upon the death of the testator, and the period of payment only was deferred. Whatever was said in *Converse v. Kellogg* (7 Barb. 596), which warrants an inference that such deferring of payment amounts to a suspension of the absolute ownership, has no sanction in the decisions of this court. (*Everitt v. Everitt*; *Gilman v. Reddington*, *supra*.) It is further claimed that the fund is to be delivered to Amelia, and she is to hold it, first for her own life and then as trustee for those interested in the remainder. The authority to which we are referred (*Smith v. Van Ostrand*, 64 N. Y. 278) turned upon special language in the will which led to a

decision that the widow had more than a mere life-estate, and was entitled to take in addition so much of the principal as was necessary for her support. In that case, too, there was an express direction that the fund be paid to her. The correct rule was declared to be, that unless otherwise directed by the will it was the duty of the executors either to invest the money and pay over the income, preserving the principal for the remaindermen, or, if they paid it to the legatee for life, to exact security which would perfectly protect the principal. There was no direction here which can be held to divert the fund from the control of the executors and give it to Amelia as trustee.

As to the next question raised, we concur with the appellants and disagree with the courts below. The will began with a bequest to the widow and a gift to her of a life estate in the homestead and household goods, followed by a devise to Emily of the one-half of the homestead and household goods, subject to her mother's right. Then come the bequests of \$1,000 and of the watch and \$35 in money already considered. And then, after providing for suitable headstones and the payment of debts and expenses, the testator disposes of the residue. One-half thereof, excluding the half of the homestead and household goods not yet disposed of, and reserved for Amelia, he gives to his daughter Emily. The other half, including such half of the homestead, he directs "to be put at interest," and then adds, "I further give to my daughter Amelia aforenamed \$100 a year, to be paid to her in person annually, and the first payment thereof to be paid to her one year after my death." It is conceded by all parties that this annuity is to be paid out of the interest, or interest and principal, of the fund just before provided, and consisting of one-half of the proceeds of the homestead and household goods, and the same proportion of any residue from other sources remaining. The contention is, on behalf of the respondents, that Amelia is to have only the interest up to \$100 a year and none of the principal. The General Term so held. They rejected the requirement that the annuity should begin one year after the testator's death, and because the homestead and household goods

could not be sold and become interest-bearing until the death of the widow, substituted a construction which begins the annuity one year after such death, and the absolute gift of \$100 a year is transformed into the gift of the interest merely, although much less in amount. We think this is making too free with the directions of the will. If the testator intended only a life estate to Amelia, the previous clauses of his will show that he knew how to declare that intention. As he had given Emily half of the homestead it was natural to give the other half to Amelia, and the final gift over of what Amelia should leave indicates that she was to have some benefit of the principal, which might result, by reason of the manner of payment, in her death before it was fully exhausted. We are of opinion that Amelia is entitled out of the interest and principal to receive her full annuity, dating from one year after the testator's death, in sums of \$100 each year, while she lives and until the fund is exhausted; and that any thing which may remain upon her earlier death is to be paid over to Emily. It is said that the residuary clauses do not work this result, and that any unexpended balance will fall into the general estate. Those clauses are as follows, viz.: "If my daughter Amelia should die, leaving any money or property arising out of the money payments devised in this will, then said money or property is to go to my daughter Emily." While this phrasing is awkward and open to criticism, it plainly refers to something given by the will in such manner that an unexpended portion may be left by the death of the legatee before exhausting the whole. And since, in addition, the testator adds: "I hereby make my daughter Emily residuary legatee of any and all matters of value," we think the balance left by Amelia's death was in the testator's mind and intended to pass as a part of the residue.

The difficulty of interpreting correctly such a will as this has been felt by every tribunal before whom its provisions have been discussed. The view we have taken of it seems to us the nearest possible approach to the intention of the testator.

The judgment of the General Term should be modified by declaring the legacy of \$35 to be general and subject to abate-

ment, and the annuity of \$100 to be payable to Amelia during her life out of the principal and interest of the one-half of the fund described as resulting in part from the sale of the homestead, commencing one year after testator's death, and any balance remaining upon her death to go to Emily; and as modified affirmed; neither party to have costs.

All concur, except RAPALLO, J., absent.

Judgment accordingly.

See *Metcalf v. First Parish in Framingham*, 1 Am. Prob. R. 11; *Delaney v. Van Aulen*, *ante*, page 337.

SHARPE vs. ALLEN.

[5 B. J. Lea, 81.]

AFTER-ACQUIRED PROPERTY.—CONSTRUCTION.

Testator wrote, "I have some real and personal property, and I do hereby make the following disposition of it," proceeding to specifically describe and devise such property. *Held*, that after-acquired property did not pass by such will.

APPEAL from the Chancery Court of Cocke county.

O. C. King, for complainant.

W. J. McSween and *McFarland & Dickson*, for defendants.

DEADERICK, C. J. On the 5th day of December, 1864, G. W. Allen executed his will, by which he gave certain property, real and personal, to his two sisters, Cynthia and Emma, and his brother, defendant Greene. He afterwards acquired

other property, real and personal, and died in 1876, leaving as his heirs-at-law and distributees, complainant and defendants.

The bill is filed by complainant, a sister of the testator, exhibiting the will, and claiming that, as to the property acquired by testator after its execution, he died intestate, and that she is entitled to a share thereof, which she seeks to have decreed to her.

Defendants, Greene, Cynthia and Emma, demur to the bill, upon the ground that the will exhibited shows that the testator did not die intestate as to any of his property, but that they are entitled, under said will, to all left at his death.

The chancellor overruled the demurrer, and the defendants have appealed to this court.

The first clause of the will gives directions as to his burial. The second directs that his debts shall be paid out of his personal property. The third is as follows: "I have some real and personal property, and I do hereby make the following disposition of it: 1st. I have a tract of land, of two hundred and fifty acres, lying on the south side of French Broad River, between the lands of Wm. Burnett and the mouth of Wolf Creek, which I hereby give and bequeath to my two sisters, Emily Allen and Cynthia Cowan, and to their heirs forever; the title to which is hereby vested in them. 2d. I have an undivided interest in the real and personal estate of my father and mother, aside from some other personal property in my own right, all and singular of which I do hereby give and bequeath the same to my said two sisters, Emily Allen and Cynthia Cowan, and to my brother, Greene Allen, jointly to share and share alike in the same." The next and last clause appoints his brother Greene executor.

The language above quoted is all that the will contains purporting to dispose of his property by the testator; and the question is, does this will dispose of the property of testator acquired by him after its execution.

By the act of 1842 it was provided, "that any estate or interest in lands acquired by a testator after making his will, of which he died seized and possessed, shall pass thereby in like manner as if owned by him at the making of his will, if such

clearly appears by the will to have been the testator's intention."

And it was held by this court, in *Wynne v. Wynne*, 2 Swan, 405, that the language, "I give to my much-beloved wife, Micha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others," clearly manifested the testator's intention that his wife should take the lands acquired by him after the execution of his will.

Before the passage of this act, lands acquired after the making of a will did not pass under it, although the testator might have so intended and directed. But this act authorized a testator to pass, by his will, after-acquired lands, by showing clearly in the will that such was his intention. This act, however, is not brought into the Code; but the act of 1851-'52, Code, sec. 2,195, seems to have taken its place. It provides that "a will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, and shall convey all the real estate belonging to him, or in which he had any interest at his decease, *unless a contrary intention appear by its words and context.*"

By the act of 1842, after-acquired realty could only pass by showing clearly such was the testator's intention.

By the act of 1851-'52, Code, sec. 2,195, after-acquired realty shall pass by the will, unless a contrary intention appear by its words and context.

The intention of the testator is to be ascertained by giving to the language employed by him a fair and reasonable interpretation.

He says: "I have some real and personal property, and I do hereby make the following disposition of it: 1st. I have a tract of land of 250 acres," describing it, "which I hereby give," &c. "2d. I have an undivided interest in the real and personal estate of my father and mother's estate, *aside* from some other personal property in my own right, all and singular of which I do hereby give to my two sisters, Emily and Cyn-

this, and brother Greene, jointly to share and share alike in the same."

It will be observed that testator, when he comes to dispose of his property, sets out by saying, "I have some real and personal property, and I do hereby make the following disposition of it," and then proceeds to dispose of a tract of land to his two sisters, and an undivided interest in land and personalty derived from his father's and mother's estate, and personalty which he claims in his own right.

The reasonable construction of this language is, that testator, at the time of making his will, had, that is, held in possession, as his own, certain real and personal property, which he disposed of by giving a tract of 250 acres of land, part of said property which he then had, to his two sisters, and then the undivided interest he held and owned in his father's and mother's estate, as well as such personal property as he then held in his own right, as contradistinguished from that which he derived from his father's and mother's estate, to his two sisters and brother Greene. Such, we think, is the obvious meaning of the language employed. He says, "I have," &c., meaning "I hold now," possession or control of the property specified; and this language is applied expressly to the 250 acres of land, the undivided interest in his parents' estate, and, by a reasonable and grammatical construction, with equal force and directness to the personal property which is in his own right. This language, in relation to personal property held in his own right, certainly cannot reasonably be held to apply to other personal property which he did not own or hold at the time, but which he might thereafter acquire, much less can anything in either clause be held to convey any other land than such as is specifically mentioned. If so, to whom does it go, and under which clause does it pass?

The words and context can bear no other reasonable construction than that testator had, at the time of making the will, a present, existing right to the property mentioned, which he then proposed to dispose of.

In 1 Red. on Wills, it is said a will speaks from the death of the testator, and not from its date, unless its language, by

fair construction, indicates a contrary intention. Hence, a devise of realty and bequest of personalty generally carries all a testator had at his death. But when, he adds, a testator refers to an actually existing state of things, his language should be held as referring to the date of the will, and not to his death, as this is then a prospective event. Pp. 370-80.

In this case, the testator says: "I have some real and personal property, and I do hereby make the following disposition of it: I have 250 acres of land, and give it," &c. "*I have* an undivided interest," &c., "and some personalty, which I give," &c.

Does not this language plainly mean that testator then owned the property mentioned, thus referring to an actually existing state of things, and, according to the authority just cited, and sound reason, showing that it was not the intention of testator that his will should pass after-acquired property, but that only which he had. The property disposed of was that which testator then had, and there is no language in the will which can be reasonably construed as disposing of any other than that specified and described.

It follows that the chancellor's decree was correct, and it will be affirmed, and the cause will be remanded for answer and further proceedings. Appellants will pay the costs of this court.

FREEMAN, J., dissenting: The construction of the will of G. W. Allen, deceased, is the matter of this litigation. It is as follows: After providing for the payment of his debts, and for his burial, out of his personal property, in the first two clauses, the third clause is as follows: "I have some real and personal property, and I do hereby make the following disposition of it: 1st. I have a tract of land, of 250 acres, lying on the south side of French Broad River, between the lands of Wm. Burnett and the mouth of Wolf Creek, which I hereby give and bequeath to my two sisters, Emily Allen and Cynthia Cowan, and to their heirs forever, the title to which is hereby vested in them. 2d. I have an undivided interest in the real and per-

sonal estate of my father and mother, *aside from some other personal property in my own right*, all and singular of which I do hereby give and bequeath the same to my said two sisters, Emily Allen and Cynthia Cowan, and to my brother, Greene Allen, jointly, share and share alike in the same."

This will was made in 1864. The testator died in 1876. The testator acquired considerable lands and personal property after making this will—the lands not included in the description of the land mentioned in the will; the personalty consisting, among other things, of bonds secured by mortgage, notes and money.

The question is, did this after-acquired property pass under the will, or did he die intestate as to it?

Under the title, "effect of events subsequent to the execution of wills," sec. 2,195 of the Code, it is provided that "a will shall be construed, in reference to the real and personal estate comprised in it, to *speak* and take effect as if it had been executed immediately before the death of the testator, *and* shall convey all the real estate belonging to him, or in which he had any interest at his decease, unless a contrary intention appear by its words and context."

This gives the rule of construction, in reference both to real and personal estate—that is, "it shall speak and take effect as if it had been executed immediately before the death of the testator," as to both kinds of property comprised in the will, and shall convey, even as to realty, all he owns at the time it speaks, that is, at his death, unless a contrary intention appear by *its* words and context." The law fixes that all his property passes, unless the words and context of the will itself shows the contrary.

As to the realty, this intention to the contrary is clearly made out from the language and context. He gives a specific tract of 250 acres, locating it specifically, to his two sisters. Second, he says, I have an undivided interest in the real and personal estate of my father and mother, *aside from some other personal property in my own right*, all and singular of which "I do hereby give and bequeath" to said sisters and his brother, Greene Allen, &c.

Now, let us construe this clause as *speaking* at the death of the testator, and see if we can find any of the property in it excluded by the "words and context" from its operation.

He is to be looked at as giving to these parties his property such as is enumerated, at that time, and all is by law given unless the contrary appears. Fix this date in the mind, and read the clause, "I have now, in 1876, an undivided interest in the real and personal estate of my father and mother, and I give this to my sisters and my brother." This is clear; the property is designated, and cannot be misunderstood. He then adds: "Aside from some other personal property in my own right, all and singular of which I hereby give," &c. *Aside*, that is, in addition to, or beside the interest in my father's and mother's estate, I have some other personal property in my own right, and this is given, as the interest I own in my father's and mother's estate is given, to said sisters and brother. What is there in this language to limit the personalty included in the last quoted clause? Nothing, that we can see. He first gives, specifically, the undivided interest in both kinds of property in this estate, and then all the other personal property he owns in his own right is likewise disposed of to the same parties. This language certainly includes all the other personalty he has at the time the will speaks, for he divides it distinctly into two classes, that from his father's and mother's estate, and "*aside*," or in addition, the other personal property owned in his own right. You can only limit this so as to exclude the entire personalty owned by him at this, the time the will speaks, by remembering that the will was made 1864, instead of 1876. If you construe it to "*speak and take effect*" in 1864, then it would dispose of only what he then had. But this is precisely what the law says you shall not do; but shall construe it as speaking immediately before his death. If construed as speaking in 1864, we would say at once he could only give what he then had in his own right. But when we take the rule prescribed by the statute, and say it speaks in 1876, then its language means, I to-day give my interest in my father's and mother's estate, both real and personal, and aside from that, I now have some other personal property in my own right, and that property, so owned now in

1876, just as I am going to die, I also give to my sisters and brother. How much personalty owned in his own right is not stated, but all he owns, aside from the interest in the father's estate, in his own right, is certainly given—when, at the date when the will speaks, that is what he owned in his own right then. What did he own in his own right then? Bonds, mortgages and money, with other personalty. We have but to find out what it is at this date, and he has disposed of it. If he did not own it in his own right, or had any personalty held in right of another, it would be excluded by the language, and not pass, because the contrary intention appears, and the gift only includes what he owns in his own right, and excludes what he may own in right of another. It is not pretended that at his death he owned any property in right of another, or did not own all the personalty he possessed in his own right; if so, all such property is inevitably disposed of by the language used.

The only real question, it seems to us, is, what did he own immediately before his death, and is any of such personalty *excluded* by the words of the will? No such exclusion is found, and therefore all goes by the gift, owned in his own right. We can only avoid this conclusion by construing the language as speaking, not at his death, but at the time of making his will, and this is to disregard the law as it is written. It is argued that the third clause changes all this, and points to the real and personal estate *then* owned by testator, that is, when the will was made. This may be conceded; but here the error is the same, in not construing this language to *speak* immediately before the death of the testator. Only apply this rule, arbitrary as it is, but imperative nevertheless, and the difficulty is solved.

But read the language—"I have now, in 1876, some real and personal property, and I hereby, at this time, make the following disposition of it"—and you are compelled to have him, by this act, about to dispose of all this property at this time, and so the entire estate would be disposed of, or is purposed to be disposed of; and then the after language speaks from the same date, and all would go, unless a contrary intention is found in words or context. The contrary intention

does appear, as to the realty, for a specific portion is alone designated as given, and to specified parties, the expression of the one thing excluding the other. But when we come to the personalty, it is all, *aside* from what he gets from his father's and mother's estate, and no specific designation of any part, which can exclude by possibility any other part not thus given. The words "all and singular," make this construction still stronger, instead of militating against it, because these words of necessity include all the beforementioned property, to wit, the undivided interest in the real and personal estate from his father and mother, and also the other property owned in his own right, "all and singular" of which he gives to the sisters and brother. What property is this? The law says the will speaks *immediately* before his death. Then, all and singular of the above property, to wit, the interest from the father's estate, and *aside*, or beside, and in addition, such other personal property as he owned then in his own right. If this does not include all he has when the will speaks, then language cannot, as we think, be found that will; but to avoid the conclusion, the language must furnish the exclusion itself. What are the words, or what the context, that does this, we are unable to see. Nothing guides to such a conclusion, except the fact that the will was made in 1864; and it seems to us we can only reach the opposite conclusion by making it speak at this date, and not at the date fixed by the law, that is, immediately before the death of testator.

For these reasons, I dissent from the conclusion of the majority of the court.

MoFARLAND, J., concurred with FREEMAN, J.

See *Byrnes v. Baer*, *ante*, page 388, and cases in note; *Blaisdell v. Hight*, 1 Am. Pro. R. 311; *Kimball v. Ellison*, Id. 533.

HERSHY *vs.* CLARK, EXECUTOR.

[85 Arkansas, 17.]

JOINT WILL TO TAKE EFFECT ON DEATH OF SURVIVOR.

There can be no such thing as a joint will to take effect upon the death of the survivor. A will must take effect at the death of the testator, and not at a time still in the future.

APPEAL from Sebastian Circuit Court.

Rose for appellant.

EAKIN, J. Abram and Aaron Clark were two brothers, both unmarried, who, working together, had, by their joint industry, acquired a large personal and real estate, all of which they held as tenants in common, regardless of whether the legal title had been taken in the name of both, or either. They had a mother, Nancy Clark, and four sisters, to wit: Susan and Sarah Clark, both unmarried, Elizabeth Miller, a widow, who died leaving an only son, Abram Miller, and the complainant, Ann Eliza Hershy, whose husband was, at the time of the transaction herein, and still is, alive.

On the eleventh of May, 1850, both brothers, being then residents of Pope county, entered into a mutual obligation in writing under seal. After reciting that they had, mutually and by their joint labor and energy, acquired what property they, and each of them, then held and possessed, they thereby agreed, between themselves, that the survivor of them should have, hold and possess, all the interest of both parties in the property, real and personal, which they then owned, to the exclusion of all other persons whatever. "Wherefore," the instrument proceeds to provide, "the said Abram Clark, for the consideration hereinafter mentioned, hereby gives and grants unto the said Aaron Clark, at the death of the said Abram (should the said Abram die before the said Aaron), all his property, real and personal, which he may now have, or which he, the said Abram, may have at the time of his death, to have

and to hold the same, to the said Aaron and his heirs forever." Aaron, on his part, and in like language, conveyed all his interest in the property, present and prospective, to Abram, in case the latter should survive. The instrument was signed and sealed by the parties, and attested by two witnesses, but not in the form usually adopted in the attestation of wills.

Abram died about the seventeenth of May, 1851, at which time the brothers owned large amounts of personal property, consisting of slaves, cash, money at interest, goods and choses in action, more than enough, taking one-half, to have paid all of Abram's debts. There were also lands and town lots so held in common, in Fort Smith, Sebastian county, and in the counties of Pope and Yell and Johnson. Aaron had, shortly before, removed to Fort Smith, and resided there. On the death of his brother he took possession of all the joint property, claiming it as his own under the agreement. He became, and was recognized as, the head of the family; and his mother depended upon him wholly for support. She was not very old, and the proof leaves the impression that she was competent to deal for herself with regard to business affairs. She renounced all claim to Abram's estate; and, in order to carry out the agreement of the brothers, she, at Aaron's suggestion, and to avoid misunderstanding, conveyed to him, on the eighth of December, 1851, all her interest in Abram's estate, real or personal. She also took out letters of administration on Abram's estate, but seems never to have acted. The object seems to have been to prevent interference, by other parties, with the transmission of the whole estate to Aaron. In all the matters she acted intelligently, without undue influence, or actual fraud on the part of Aaron.

Aaron died on the fourteenth of November, 1855, leaving a will. By it he gave to his mother and his sister Sarah all his real estate in Sebastian and Pope counties, to hold as tenants in common; also, his personal property of all kinds, subject to his debts. To his sister Elizabeth Miller he gave all his real estate in Perry and Johnston counties; and to complainant, Ann Eliza, all his real estate in Yell county, and other real estate not disposed of. This will was duly probated on

the seventeenth of November, 1855; and Sol. F. Clark, named as executor therein, received letters testamentary. He seems to have taken no control of the real estate; and the personal property which came to his hands was by him, with some trivial exceptions, turned over to said Sarah.

On the twelfth of June, 1860, Sarah and her mother Nancy executed a writing which they described, and intended, as their joint will, duly attested by witnesses. By it they gave to Elizabeth Miller, with some real estate, a negro boy, all their household and kitchen furniture, and a carriage and horses. To the complainant, Ann Eliza, they gave a thousand dollars, and also the remainder interest in all the property given to Mrs. Miller after the latter's death. The balance of their property they bequeathed to trustees for charitable purposes.

It was provided, however, that the "bequests and devises" should be postponed, as regarded use and enjoyment, until the death of *both*, with a reservation of right in the survivor to have the sole control, management and disposal of all the property during her life—the balance, undisposed of, at the death of the survivor, being all that was subject to the provisions of the will.

Susan had meanwhile died unmarried; and on the twenty-seventh of November, 1861, Nancy Clark died, leaving as her next of kin her three children—complainant, Elizabeth Miller and Sarah. No notice at the time was taken of the joint will, and in 1870 complainant's husband, Benjamin F. Hershy, was duly appointed administrator of her estate. On the fourteenth of September of that year, Sarah being still alive, the foregoing joint will was probated by the oath of one of the witnesses.

About that time complainant, Ann Eliza Hershy, filed this bill against Sol. F. Clark as administrator of the estate of Aaron Clark, her husband, Benjamin F. Hershy, as administrator of Nancy Clark, Sarah Clark and Abram Miller, claiming as one of the heirs of her brother Abram, and also as heir and distributee of her mother Nancy. She seeks an account of the personal effects turned over to Sarah by Sol. F. Clark, the

executor of Aaron, and of the personal property of her mother, and of moneys received by Sarah for rents and profits, and for sales of lands; and that her distributive share of said estates be ascertained, and that she have *partition*, etc., etc.

Sarah Clark answered the bill, insisting upon the good faith of the conveyance from her mother to Aaron of the property she derived from Abram's estate, and denying all fraud or imposition, or undue influence. Her answer does not controvert the material facts above set forth, and upon them she bases her right to retain the property. She makes her answer a cross-bill to quiet her title. Abram Miller adopts her answer.

The statute of limitations was also relied on by defendants.

The cause was heard upon the pleadings, exhibits and depositions. The court upon hearing, came to the conclusion that the matters set forth in the bill did not entitle complainant either to an account or partition, and dismissed it with costs. She appealed.

The instrument executed between the brothers conveyed nothing *in presenti*. The intention of it is expressly declared to be that the *survivor* should have all the interest of both parties in the property. The use of the present tense in the word "gives" and "grants" is qualified by the words which follow, "at the death of said Abram," in one contingency, and "at the death of said Aaron" in the other. It is not the case of a vested right conveyed by the instrument, reserving a life estate in the grantor. It has been repeatedly held that such an instrument as that last mentioned will be sustained as a valid deed *inter vivos*. They were often used in dispositions of slave property, and sustained, so far as the cases have come within our notice, by the courts of all the Southern States. But this instrument, now before us, is not of that character. It professes to convey nothing *in presenti*, and cannot stand as a conveyance; nor can it be upheld as a mutual covenant. It is unreasonable, and against public policy, that one should be allowed, by an irrevocable contract, not only to denude himself of all control of all his property, of every nature whatever, which he at the time possesses, but also of all he may

afterwards acquire. Such a contract would not be enforced either in law or equity. It is obvious, too, that the brothers did not intend their obligations to have that force during their lives.

There is no possible view of this contract which would give it any binding force during their joint lives. It was revocable at pleasure by either.

Whether, if properly proven, it might not have operated, on the contingency of the death of one of them, as his *separate* will, is a question which does not arise, and upon which we intimate no opinion. No effort was made to prove or sustain it as the will of Abram, with regard to his share of the joint property.

The effort of Nancy Clark and her daughter Sarah, to execute a *joint* will was nugatory. There can be no such thing as a *joint* will, to take effect on the death of the survivor. A will must take effect on the death of the testator, and not at a time still in the future. This instrument, so far as regards Nancy Clark's property, could only have taken effect by its terms, by vesting in Sarah the complete disposition and control of all her mother's property, without imposing any obligation on Sarah to carry out the benevolent purposes had in view by both; for, with regard to the latter, her part at least was, and remains, ambulatory, and she may defeat the common intention by changing her will. There is no mutuality with regard to the future charitable objects; and the mother cannot be supposed to have intended that the remnant of her property, not disposed of by Sarah, should go in any event to the charities in view, without the aid of Sarah's property also.

This effort illustrates the force of the principles stated by Mr. Jarman in his work on Wills, vol. 1, p. 27. He says: "A joint or mutual will is said to be unknown to the testamentary law of England. An objection to such an instrument as testamentary, is its irrevocability, for it is of the essence of a will that it is ambulatory, and may be revoked at any time prior to the death of the testator." And he refers to *Clayton v. Liverman*, 2 Dev. & Battle, 558, which is directly in point.

The joint instrument between Abram and Aaron Clark,

and the joint will of Nancy and Sarah Clark, should both have been disregarded.

The complainant was, at the death of Abram, and has since continued, a *feme-covert*. She is not barred by the statute of limitations.

She is entitled, under our statutes of descents and distributions, to a share of the real estate of which her brother Abram died possessed; also, to her proper share of the real and personal property of her sister Susan and her mother. She is entitled to an account, to be taken under the direction of the court, to ascertain these interests.

She must elect, however, as her bill virtually does, to disclaim all rights to the property in question acquired, directly to herself, through the will of her brother Aaron. That will disposes of interests which she claims adversely, and the case for election arises. She must rest on her rights to any of the property in question derived through the statutes of descents and distributions from Abram or her mother or her sister Susan. The property has never been divided, and it must all be done in one suit. The usual remedial proceedings in equity are sufficient.

The court erred in dismissing the bill for want of equity. Reverse, and remand for further proceedings consistent with law and this opinion.

Mutual wills.—As to the use of the term “conjoint” in wills, or as applied to them, see *Dufour v. Pereira*, 1 Dick. 421.

In the goods of Stracey, Dea & Sw. 6, joint wills are held valid.

Such a will is entitled to a separate probate upon the death of each testator. *Schumaker v. Schmidt*, 44 Ala. 454.

Conjoint wills are revocable as wills but irrevocable as contracts. *Gould v. Mansfield*, 103 Mass. 408; *Evans v. Smith*, 28 Ga. 98; *Clayton v. Livermore*, 2 Dev. & Bat. L. 558; *Schumaker v. Schmidt*, cited above.

In Ohio joint wills have been held void. *Walker v. Walker*, 14 Ohio State, 157.

In England *mutual* wills are held to be a legal impossibility. *Earl Darlington v. Pulteney*, 1 Cowp. 260.

But there are later cases holding that agreements to make a mutual will are valid. *Izard v. Middleton*, 1 Dessaus. 116; *Rivers v. Rivers*, 8 Dessaus. 190; *Ex-parte Day*, 1 Bradf. 476.

When two persons agree to make mutual wills, bad faith on the part of one of them will not prevent the probate of the will of the other. *Bynum v. Bynum*, 11 Ired. L. 682.

The mutual will of husband and wife is the separate will of each. *Denyssen v. Mostert*, L. R., 4 P. C. 236. See also 8 Moore's P. C. C. (N. S.) 502.

In Alabama such wills are revocable. *Schumaker v. Schmidt*, cited above.

In Kentucky the revocation must be joint. *Breathitt v. Whitaker*, 8 Ben. M. 530.

A will made jointly by husband and wife, devising property which is the husband's alone, is valid as his will. *Rogers' Applt.*, 11 Me. 303; *Kunnen v. Zurline*, 2 Cin. (Ohio), 440.

A mutual will of husband and wife devising reciprocally to each other is valid. It will operate as the separate will of whichever one dies first. *Re Diez*, 50 N. Y. 88.

A will purporting to be the will of two persons disposing of all their property jointly, is neither a joint or a separate will. *Clayton v. Livermore*, cited above. See a very curious case, *Lewis v. Scofield*, 26 Conn. 453.

MUNROE vs. PEOPLE.

[102 Illinois, 406.]

POWER OF COUNTY COURT TO REMOVE ADMINISTRATOR.

A county court, in the absence of statutory authority, has no power to revoke letters of administration after the administrator has accepted and qualified.

A failure to pay a creditor his claim allowed, against the estate, although the estate was solvent and all other claims had been paid with the fact that the administratrix had, by deed from the heirs, become the owner of the only piece of land on which the creditor's judgment was supposed to be a lien, does not make a case for removal for waste or mismanagement or other cause.

ERROR to the Appellate Court for the Second District.

Garnsey & Knox, for plaintiff in error.

Stephen R. Moore and *Thomas Hutchins*, for defendants in error.

DICKEY, J. Young sues Mrs. Osgood as principal, and Munroe as surety, upon a bond given by defendants for the faithful administration of the estate of Uri Osgood, deceased. The plaintiff sues as administrator *de bonis non* of the same estate, as the successor of Mrs. Osgood, and for a failure on her part to pay over to him certain moneys of the estate said to be in her hands. Defendants pleaded, *inter alia*, that Young is not administrator. On this issue was produced in evidence a full transcript of the record of the County Court, from which it appears that that court did make an order revoking the letters formerly issued to Mrs. Osgood, and afterwards did appoint Young administrator *de bonis non*.

The Circuit Court, with this transcript in evidence, instructed the jury, as a matter of law arising from this evidence, that "Mansfield Young is administrator *de bonis non* of the estate of Uri Osgood," and that Mrs. Osgood was removed, and on these questions the law is for the plaintiff. This instruction was clearly wrong. The pleadings show that Mrs. Osgood was appointed, gave bond, and qualified as administratrix of the estate, in February, 1871, and acted as such for many years, and it follows that she still is such, unless the orders of the County Court, already mentioned, terminated her administration. On inspection of the transcript of the proceedings of the County Court, in which the supposed revocation of her letters occurred, we are of opinion that the order of revocation was and is utterly void, and of no effect whatever.

Defendant in error contends that these orders were made by a court of competent jurisdiction, and are of force and valid until reversed or set aside. There is no doubt that where a matter is submitted to a court upon which that court has authority to consider and decide, and such court does decide, such judgment, though erroneous, is valid until reversed or set aside; but unless a case brought before a court be such that the court has the lawful authority to deliberate and decide, such court has no jurisdiction, and its decision in such case is a nullity. The case must be one committed to that court by law. Chief Justice Marshall said: "Suppose administration be granted on the estate of a deceased person whose executor is present in the

constant performance of his executory duties, * * * in the opinion of the court it would be absolutely void. The appointment of an executor vests the whole personal estate in the person appointed. He * * * holds the legal title in all the chattels of the testator." And it is there said, so long as he remains executor, this "is incompatible with any power in the ordinary to transfer these chattels to any other person, by grant of letters of administration on them. His grant can pass nothing,—it conveys no right, and is a void act." It is plain that unless the order revoking the letters of administration granted to Mrs. Osgood be valid, there was no power or jurisdiction in the County Court to appoint Young administrator *de bonis non*, and the order for his appointment was absolutely void.

We think the order revoking and repealing the letters issued to Mrs. Osgood was also a mere nullity,—absolutely void,—for want of jurisdiction in the County Court to act. The County Court, in the absence of statutory authority, has no power to remove an administrator, or to revoke letters of administration, after the administrator has accepted and qualified and entered upon his duties. Our statute authorizes the removal of administrators, and the revocation of letters, for divers causes mentioned therein. Letters may be revoked "in all cases where the same were granted * * * upon any * * * false pretense whatever" (Rev. Stat. chap. 3, sec. 26), and where, after their issue, "a will of the deceased shall be produced, and probate thereof granted according to law (sec. 28), and "the County Court may revoke all letters testamentary or of administration granted to persons who become insane, lunatic, or of unsound mind, habitual drunkards, are convicted of infamous crimes, waste or mismanage the estate, or who conduct themselves in such manner as to endanger their co-executors, or co-administrators, or securities,—in all which cases the court *shall summon* the person charged to be in default or disqualified, *as aforesaid*, to *show cause* why such revocation should not be made. When revocation is made, the *reason therefor* shall be *stated at large* upon the record." (Sec. 30.) And when notified (on account of being about to remove from the State), for

four weeks, to appear before the court "and make settlement of his accounts," and he neglects or refuses to make such settlement, the court "may remove an administrator from office" (sec. 31), and in default of giving other, or additional, or new security, when required by the court to do so, or in default of settling and adjusting his accounts within a time fixed by the court, the letters of administration "shall be revoked." (Secs. 32, 33 and 36.) These are the cases, and (so far as called to our attention) the only cases, wherein power is given by statute to the County Court to remove an administrator and revoke and repeal his letters of administration. Until some one of the causes mentioned in the statute is placed before the court for action, the court has no power to act at all in this regard,—has no jurisdiction to act. To render the judgment of any court valid, it is essential that such court shall have jurisdiction of the person, and also of the subject-matter. Looking at the full transcript, we find that when the County Court made the order revoking the letters granted to Mrs. Osgood, that court had neither.

It was not alleged that *any one* of the cases, mentioned in the statute as such that the court may order the revocation of letters, was presented or before the court. The only facts stated in the petition as authorizing the court to act are, that she, as administratrix, had failed and neglected to pay the complaining creditor the amount of his claim allowed against the estate, although the estate was solvent, and all other allowed claims had been paid, and that she had become the owner, by deed from the heirs, of the only tract of land on which the judgment of the creditor was supposed to be a lien; that to satisfy this demand it would become necessary to sell that land, and that under the circumstances the creditor thought it advisable to remove the present administratrix and have a new administrator appointed. The statute nowhere gives jurisdiction to the County Court to remove for any such cause. The statute prescribes other remedies for such case. In the language of Chief Justice Marshall (speaking of the ordinary): "The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law."

Again, the County Court had not acquired jurisdiction of the person for this purpose. It is true a citation had been served on her on the 5th of December, 1877, to appear before that court on the 17th day of that month, and show cause "why she *should not pay* said claim" of this creditor, and that she omitted to appear and show such cause. But this did not give the court jurisdiction of her person to adjudge on the 15th day of the next month, and with no further notice to her, that she, as administratrix, should be removed, and her letters revoked. Circuit Courts have jurisdiction to enter judgment in actions of assumpsit. They have also jurisdiction to sentence men to the penitentiary for larceny. It, however, cannot be inferred that by a summons in an action of assumpsit, duly served, a Circuit Court acquires jurisdiction of the person of the defendant to try and convict him, in his absence, for larceny of the property, for the price of which the action of assumpsit was brought. Such a proceeding would simply be void. There is nothing in the statute impairing the principle upon which these views rest. To the contrary, before the court has lawful power to adjudge a revocation of letters of administration, it is expressly provided "the court shall summon the person charged to be in default," not to show cause why he shall not pay a certain claim, but "to show cause why *such revocation should not be made.*" And the more effectually to limit the power of the County Court in such a proceeding, it is added: "When the revocation is made, the reasons therefor shall be stated at large upon the record."

The order removing the administratrix being void, and hence the order appointing an administrator *de bonis non* being also void, the right to the custody of the moneys and property of the estate remained in Mrs. Osgood. Young was a mere intermeddler, without any rights or legal authority. The refusal to pay over to him was no breach of the condition of the bond sued on. The plaintiff clearly had no cause of action.

The judgment is therefore reversed, and the cause dismissed.

Judgment reversed.

BLAND vs. BLAND.

[108 Illinois, 12.]

CONSTRUCTION OF DEVISE.—“HEIR” MEANING “CHILD.”

Testator, after payment of debts, devised the residue of his estate, real and personal, as follows, to wit: to his wife and five youngest children, whom he named, a specified farm; the rest of his personal estate also to his wife “and the five above named heirs—that is to say,” to his wife for life and to the minor heirs until they became of lawful age; to his “other heirs and oldest children, heirs at law,” naming them, five dollars each; “and at the time of the youngest heir becoming of lawful age, the property, both real and personal, to be divided amongst my children, share and share alike.” *Held*, that it was the intention of the testator that the farm devised should be divided amongst his children when the youngest child became of age; that the devise of such farm to the widow and five youngest children was a qualified devise to them until the youngest child attained majority; the word “heir” means child.

APPEAL from Peoria county Circuit Court.

Suit for partition by the four elder children of John Bland against his widow and five younger children, involving the construction of a will of which the material portion is as follows:

“First, after all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my beloved wife and five youngest children—that is to say, Rachael Ann Bland, Charlotte Bland, Elizabeth J. Bland, David Bland, and Eliza Paradine—the farm and all its appurtenances thereunto belonging, known and described as follows, to wit: it being 157 acres, being and lying in the south-west quarter of section 34, in township 11, north of the base line, in range 8, east of the fourth principal meridian. All the rest, residue and remainder of my personal estate also to my beloved wife and the five above named heirs,—that is to say, to my wife during her natural life, and to the minor heirs until they become of lawful age to account for themselves. To my other heirs and oldest children, heirs at law, I give and bequeath the sum of five dollars each; to Margaret Bland five dollars, to William

Bland five dollars, to Mary Ellen Pierce five dollars, and to John A. Bland five dollars and two yearling colts (one is a bright bay, the other is brown, with a bald face and white hind legs); and at the time of the youngest heir becoming of lawful age, the property, both real and personal, to be divided amongst my children, share and share alike."

Stevens & Lee, for appellants.

Cooper & Tennery, for appellees.

SHELDON, J. The question presented is simply one of the construction of the will—whether, as appellants claim, all the children of the testator, the older as well as the younger set, are to share equally in the land described in the will, or whether, as appellees' claim, the widow and the five younger children take the land in fee and in equal parts among them to the exclusion altogether of the four older children.

Looking at the first clause of the will by itself, the widow and five youngest children take the whole land absolutely, and taking the first and second clauses by themselves, the more natural construction would be the same, that the widow and five youngest children take the land absolutely, and as to the personal estate, that that was given to them only during the natural life of the widow, and until the minor heirs became of age. But this looking at, and resting upon, some particular clause or clauses of an instrument, is not the right mode of construing it—it must be looked to in all its parts, and the entire will will be considered together, in order to ascertain what is its meaning. Now, when we come to look at the last clause of this will, we see that when the youngest child becomes of age, the property, both real and personal, is to be divided amongst the testator's children, share and share alike. It is *the property*, both real and personal, which is to be thus divided—that is, the property before mentioned and devised. As this farm devised was all the real property the testator had at the making of the will and his death, as the demurrer admits, it was this farm—the real property he had been speak-

ing of and had devised to his wife and five youngest children—which, no doubt, the testator had in mind when he said, the property, both real and personal, should be divided amongst his children. And he said it should be divided amongst his children—not amongst his five youngest children.

Appellees' construction disregards this third clause, and denies to it any force and effect, but the will is to be so construed, if possible, as to allow effect to every part. It is the intention of the testator derived from the whole will which must govern. Reading, then, these three clauses of the will together, we find that it was the intention of the testator that this farm which he devised should be divided among all his children, share and share alike, when the youngest child came of age; that the devise of the farm to the widow and five youngest children mentioned in the first clause was not a devise to them absolutely, but a qualified devise to them until the youngest child should come of age; that there was the same limitation of the devise of the real estate that there was of the personal estate; that in the second clause, "all the rest, residue and remainder of my personal estate also to my beloved wife and the five above named heirs—that is to say, to my wife during her natural life, and to the minor heirs until they become of lawful age to account for themselves,"—the limitation therein following the words "that is to say," is not confined to the personal property, as would seem the more natural construction from the reading of this clause alone, but that it applies to the real estate as well as to the personal property. Such we believe to be the true construction in view of the last clause—the one which effectuates the intention of the testator as there manifested—and which the application of the well known rules of construction requires to be made. It is necessary in order to give effect to the last clause, and it gives effect to all the clauses of the will.

In *Rountree v. Talbot*, 89 Ill. 249, this court said: "The great and leading principle in the construction of wills is, that the intention of the testator, if not inconsistent with the rules of law, shall govern, and this intention is to be ascertained from the whole will taken together. Courts will, if possible,

adopt such construction as will uphold all the provisions of the will." So in *Brownfield v. Wilson*, 78 Ill. 467, it was said: "It is one of the familiar rules of construction, whether of a will or other instrument, that in cases of doubt all its parts should be considered together, and, if possible, to give every clause and provision effect according to the intention of the maker. When ascertained, the intention of the testator must be enforced." And further: "The question, however, is, the entire instrument considered, what did the testator intend by the will?" And see *City of Peoria v. Darst*, 101 Ill. 609.

We find that by this will he intended this farm should be divided amongst all his children, share and share alike, when the youngest of them came of age.

In case of this being found to be the true construction of the will, the question is suggested whether any division of the property can now be had. This question is raised upon the showing of the bill that one of the five younger children has deceased, leaving an only child and heir, which is still a minor, and by the terms of the will the property is to be divided "at the time of the youngest *heir* becoming of lawful age." We have no doubt that by the term "heir" the testator meant child, and as the bill avers the youngest child had become of lawful age, we see no obstacle in the way of a present partition.

The decree of the circuit court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

CROFT, EXECUTOR *vs.* WILLIAMS.

[88 New York, 384.]

LIABILITY OF EXECUTOR FOR ACTS OF CO-EXECUTOR.—LOAN BY
EXECUTOR TO CO-EXECUTOR TO PAY ESTATE DEBTS.

A loan of money by one executor to a co executor upon the latter's individual note and representations that the money was to be used to pay debts of the estate, but it was not in fact so used, is not a proper charge against the estate. An executor who receives and pays over estate funds to a co-executor is liable for the latter's misappropriation of the same.

Where, however, two executors under a power of sale in the will entered into a joint contract for a sale of real estate, and the purchaser made a payment in the presence of both, which one of them took without objection from the other, and subsequently misappropriated. *Held*, that, in the absence of evidence charging him with negligence, the latter was not liable; that the fact that the co-executor was insolvent was not alone sufficient to so charge him; and that the fact that he joined in the sale did not make him liable.

Also *held*, that he was not made liable by acts of negligence on his part, which in no way were connected with or contributed to the loss.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, which affirmed a decree of the surrogate of Ulster county upon settlement of the accounts of appellant as executor of the will of Mary E. Williams as to items in said decree appealed from by him, and modified the decree by charging him with certain additional items.

The testatrix died in 1868; by her will her husband, John Williams, and the appellant, were appointed and qualified as executors. The testatrix left no personal property of any consequence. She left a house and lot at Rondout, and a farm at White Plains which the executors had a power to sell. In October, 1869, Williams applied to Croft for \$2,000. The purpose avowed was to pay a mortgage on the house and to pay bills and funeral expenses. Thereupon Croft advanced to Williams the sum required and took Williams' note therefor, not signed as executor. Williams at the time made up but did not execute a paper reciting that he had paid out of his own funds this bond and mortgage and a note and debts of the

estate amounting in all to \$5,064 36, and containing an assignment of these claims to Croft as collateral to the \$2,000 note. For this note thus given to Croft, Williams confessed judgment. Croft claimed to be allowed this \$2,000 and interest thereon, but the surrogate disallowed it.

The facts as to the other items, about which there was question, are sufficiently stated in the complaint.

Calvin Frost, for appellant.

J. Newton Fiero, for respondents.

FINCH, J. We have discovered no just objection to the conclusions of the surrogate, from which the executor appealed, but which the General Term affirmed. The claim to be allowed \$2,000 and the interest thereon was properly rejected, since the evidence fairly proved that it was a personal loan to the co-executor for which his individual note was taken, and that the money did not go to the benefit of the estate. The two sums of \$800 and \$636 12, charged to the executor, were admitted to have been received by him. As he accounted for them in no other manner than by delivering them to his co-executor, by whom they were misappropriated, he established no right to be credited with them in his account. The decision of the surrogate as to these three items was, therefore, properly affirmed by the General Term.

That tribunal, however, did not stop with such affirmance, but modified the account as settled by the surrogate by further charging against the executor items not charged by the surrogate, amounting to about \$4,500 more. Five of these items consist of money of the estate found to have been received by the executor. As to that fact the evidence in each case was contradictory, but sufficient to sustain the conclusion of the General Term, which we think was correct. These items, also, were accounted for in no manner as having been expended for the benefit of the estate, and were properly charged against the executor in his account.

A final item remains with which he was also charged, but

upon an entirely different ground. Upon a sale of real estate belonging to the decedent, a balance of purchase-money amounting to \$1,167 77 was paid in by the purchaser. Both executors were present at the time, but it was actually received by the executor Williams. As to this fact both the surrogate and the General Term agree, and the accounting executor was not chargeable upon the ground of his receipt of the money. He has been held liable for a *devastavit* by his co-executor, and it remains to be considered whether any facts were established which warrant the legal conclusion of such liability. The general rule is that the executor is responsible for his own acts, and not for those of his associate; so that if he receives and misapplies the money, or does any act by which it gets to the hands of the other who diverts or wastes it, and but for which act the latter would not have had it, a liability to make good the loss results. (*Langford v. Gascoyne*, 11 Ves. 335; *Ames v. Armstrong*, 106 Mass. 18; *Candler v. Tillett*, 22 Beav. 257; *Clark v. Clark*, 8 Paige, 152; *Monell v. Monell*, 5 Johns. Ch. 296; Williams on Ex'rs, 1927.) If the executor is merely passive and simply does not obstruct the collection or receipt of assets by his associate, he is not liable for the latter's waste, but where he knows and assents to such misapplication, or negligently suffers his co-executor to receive and waste the estate when he has the means of preventing it by proper care, he becomes liable for a resulting loss. (*Sutherland v. Brush*, 7 Johns. Ch. 17; *Adair v. Brimmer*, 74 N. Y. 566.) Mere assent to the co-executor's receipt of the funds is not enough. In the case last cited all the money of the estate was received and disbursed by the common agent of all the executors, and advances were made to a co-executor for his personal use with the knowledge and express assent of his associate. Ordinarily, in the collection of assets the rights of each are alike, and one has not control or supremacy over the other. One, therefore, may sit passive and see the other receive funds of the estate, and making no objection be deemed to assent, but that does not make him responsible for what has been received. He must in some manner know and assent to the misapplication, he must be a consenting party to the waste,

or neglect some duty consequent upon his knowledge of a misapplication intended or in progress. (*Williams v. Nixon*, 2 Beav. 472.) A wrong done or a duty omitted must lie at the foundation of his liability.

The executor in the present case sat by and saw his associate receive the \$1,167 77 without objection. Indeed, he is made to say that he consented to it, and he did, in the sense that he did not object, for he explains his assent by the question put to his cross-examiner, "what would I do in that case: say—you are not responsible, and hand that money over?" The consent which he admits and of which he speaks was that he did nothing to obstruct his co-executor's receipt of the money, and made no objection. His consent was nothing more than passive and contented submission to the exercise of an admitted right by his associate, and was in no sense wrong or negligent unless other concurring facts make it so. It is said that such other facts were present. They all cluster about the insolvency of Williams, his embarrassed circumstances and need of money. He was poor, and hampered by lack of means, and Croft undoubtedly knew and realized the fact; but that is not enough. It does not follow that because a man is poor and needs money that he will, therefore, embezzle trust funds or steal an orphan's inheritance. Honest poverty is quite as worthy of trust as honest wealth. The testator selects his executors for himself, and where he has placed his confidence, even if the chosen trustee be poor or insolvent, it is not for the associate executors to withhold theirs, the situation being unchanged, unless some misapplication or dishonesty is threatened or manifest. Now the money here in question was received by Williams in April, 1870. This balance was the first money of the estate, so far as the evidence discloses, which he had received, except the \$1,650, constituting the ten per cent. transferred to him by Croft. He had wasted nothing belonging to the estate so far as Croft knew or had reason to believe. The only other prior transaction preceding it was the loan by Croft in October previous of \$2,000 to Williams to aid the latter in paying debts of the estate which were represented to exceed \$5,000, and of which a detailed statement

was presented. For that loan Croft took Williams' individual note. If he knew him to be insolvent he at least confided in his honesty sufficiently to put in peril his own money. The statement presented at the time asserted that these debts had already been paid by Williams, for they were to be assigned to Croft as collateral. When, therefore, within a few months after, this balance of purchase-money was paid, Croft had a right to suppose that Williams ought to receive it, in addition to what he had received, and so reimburse his outlay if made, or if not, have it to apply upon debts of the estate. We fail to discover, at this point of time, any fact or reason which should have aroused Croft's suspicions or put him on guard against his co-executor. The latter was the husband of the testatrix, and the legatees his own children. Croft could not very well be swift to suspect an intention of wronging them. The other facts brought to our attention occurred later. The free spending of money, the trip to the west and the piano purchased for one of the legatees, very possibly at her request, the frequent demand upon Croft for funds came later, and have no just bearing upon the situation when this payment was made. It seems to us, therefore, that Croft was not at all liable for its amount. Nothing had occurred to impose upon him the duty of objecting, and it is not at all certain that he could have prevented the payment if he had objected. It is urged, however, that he is liable because he joined with Williams in the sale of the farm from which the money arose and must be held to have taken a concurrent control of the fund. It is assumed that the executors here acted under a power of sale given by the will. It was, therefore, necessary that both should join. (1 R. S. 735, § 112.) There are cases which give some color to the idea of liability for a joint sale where the proceeds were received by one alone, but the better opinion both upon authority and principle is, that such joint act, where necessary and only formal, by itself, draws with it no liability for the waste of the co-executor. (Williams on Ex'rs, 1937, note *u*; Perry on Trusts, §§ 420, 423.) That, at least is the law in this State. (*Kip v. Deniston*, 4 Johns. 25; *Monell v. Monell*, 5 Johns. Ch. 296.)

It is further sought to charge the executor upon grounds of general negligence. He did not file an inventory, but the loss of the item in question is in no manner the consequence of that neglect. He kept no separate accounts, and neglected and postponed a settlement. But the loss did not spring from those omissions. They would justify in the allowance of interest, or the construction of the executor's acts, some degree of severity, but do not, we think, make him liable for a waste due to his co-executor alone, where the loss is not at all traceable to the omissions.

The judgment of the General Term should be modified by deducting therefrom the sum of \$1,167 77 and interest thereon charged against the executor, and as modified affirmed, without costs to either party as against the other.

All concur, except RAPALLO, J., absent.

Judgment accordingly.

See *McKim v. Aulbach*, *ante*, page 253, and cases in note.

FOWLER vs. STAGNER.

[55 TEXAS, 393.]

REQUEST TO SUBSCRIBING WITNESS—PLACE OF SUBSCRIPTION BY ATTESTING WITNESSES.

Where there are only two subscribing witnesses, a bequest to one is made void by the statute requiring such a ruling "if the will cannot otherwise be proved." It is not material in what part of a will the attesting witnesses sign their names, if it were done after the subscription and acknowledgment of it by the testator and with the purpose of attesting it.

APPEAL from Caldwell.

Suit to contest the validity of the probate of the will of

Susan M. Larremore proved in Caldwell County Court in April Term, 1869.

On trial by jury a verdict was returned for defendant upon which judgment was entered.

Jones & Sayers and Russell and J. P. Fowler, for appellants.

QUINAN, J. COM. APP.—The decree of the County Court of Caldwell county, admitting to probate the will of Mrs. Larremore, was the judgment of a court having general jurisdiction over the probate of wills, and is conclusive and unimpeachable upon any collateral attack. Every presumption will be indulged in its favor. That decree will stand until set aside by a proceeding had directly for that purpose. And in such proceeding, the burden of proof is upon the party seeking to establish the invalidity of the will or its probate. Freeman on Judgments, 319a, 608; *Guilford v. Love*, 49 Tex. 115; *Steele v. Renn*, 50 Tex. 482; *Beazley v. Denson*, 40 Tex. 436.

In this suit, brought directly for that purpose, the facts of the residence of Mrs. Larremore and her death in Caldwell county, and consequently that the court had jurisdiction, were shown. The proof was also abundant to establish her sanity; that she executed the will and dictated it; that she was of lawful age, and that it was attested by witnesses of lawful age, who subscribed it as such in her presence. In fact there was no proof of the absence of any circumstance necessary to the due execution of the will, or of the existence of any fact to invalidate it, unless it be that the will is attested by only two witnesses, and one of these, Powers, is a devisee under the will and appointed one of the executors. And this presents the important question in the case: Was this will duly executed?

The statute of wills declares it in effect essential to the validity of a will, that, if it be not wholly in the handwriting of the testator, it shall be attested by two or more credible witnesses, above the age of fourteen years, subscribing their names in his or her presence. A credible witness is a compe-

tent witness. Redfield on Wills; *Lewis v. Aylott*, 45 Tex. 190; *Nixon v. Armstrong*, 38 Tex. 298. One who is interested as taking under the will is incompetent to testify to establish it. And this is true notwithstanding any general law removing the disability of witnesses on the ground of interest. The law at the time of the execution of this will, and the law now, provides how, and in what case, and with what effect, a will which is attested by a witness who is named a beneficiary therein, may be proved by such witness. Such a provision would be useless were it not that competency and credibility in the meaning of the statute are the same thing, and that without this provision such witness could not in any case testify.

The tenth section of the statute reads: "If any person shall subscribe his name as a witness to a will in which any bequest is given to him, if the will cannot be otherwise proved, the bequest shall be void, and such witness shall be allowed and compelled to appear and give testimony on the residue of the will, in like manner as if no such bequest had been made," &c.

This section did not repeal or qualify the first section of the act. A will is still invalid unless attested by two disinterested witnesses who take nothing under it. Nor is the will void because attested by one to whom a bequest is made. The policy of the statute is to prevent frauds, imposition or deceit, by providing that these dispositions of property, usually made in ill-health or at the near approach of death, and under circumstances peculiarly liable to imposition, shall be fairly made in the presence of at least two wholly disinterested persons; and also it is its policy to uphold the right of a testator to make such dispositions and prevent their failing because of the incompetency of the witnesses, by reason of any bequest left them by the will; and this it effects by declaring such bequest void.

Now here the will of Mrs. Larremore cannot be established should the attesting witness Powers take anything under it, because it would lack the necessary legal number of competent witnesses. The execution of it may indeed be proved by the

oath of one witness, the witness Laney, who is wholly disinterested, but that proof would simply show the will invalid, when it appeared that Powers was both witness and legatee under it, unless we hold that by the very fact of Powers subscribing this will, there being but two attesting witnesses, the bequest to him in the will was avoided, and that he was therefore competent. It was not necessary that Powers should be called or compelled to testify, or that he should execute a release, but it was essential that he should take no interest under the will, and that is effected by operation of the law.

We believe this the fair construction of the statute. The language of the section quoted, "if the will cannot otherwise be proved," must be understood as meaning if the will cannot otherwise be established as a valid will; not that proof of its execution by one witness would dispense with proof of its attestation by two competent witnesses, or that a will is well executed if attested by one disinterested witness, though all the other subscribing witnesses are parties in its maintenance and beneficiaries under it, who cannot be called to testify with respect to its execution, so long as the one witness can be produced, but will continue to claim and hold under it.

We conclude, that, although the will of Mrs. Larremore was well proven, the bequest to Powers was void.

We are sustained in the views we have expressed by the case of *Nixon v. Armstrong*, 38 Tex. 29. But we need in this case intimate no opinion as to the effect or result had there been to this will other witnesses than Laney and Powers who were also interested.

It follows, then, in the present case from what we have said, that the charge of the judge to the jury, though doubtless, as far as it goes, good law, was, however, erroneous in failing to present to them the effect of the statute upon the bequest to Powers. They should have been instructed that his competency and credibility as a witness was the result of the nullity of the bequest to him.

The effect of the verdict of the jury and the judgment of the court is to establish the will without avoiding the bequest, and the judgment should therefore be set aside.

It is not necessary to notice more specifically the errors assigned upon the judge's charge, or the overruling the motion for a new trial.

The objection made to what is styled in the will a codicil, as not properly executed, we are of opinion is not well taken. It appears from the testimony that this clause, which simply provides for the appointment of executors, was written at the same time as the body of the will, upon the same paper, subscribed at the same time by Mrs. Larremore, and that the attestation by the witnesses was made after its execution, and with the intention of attesting the execution of the whole will. It was not material, we think, in what part of the instrument they signed their names as witnesses, if that were done after the subscription and acknowledgment of it by the testator, and with the purpose of attesting it as subscribing witnesses. 1 Redfield on Wills, 233; *Roberts v. Phillips*, 4 El. & Bl. 450. The determination now, however, of the validity of the attestation of this part of the will is not very material. The estate of Mrs. Larremore has been, it appears, so far administered that it only remains to partition the property among those entitled to it. The acts of the executors acting under the will as probated would not be invalidated because their appointment was afterwards held irregular.

The objection made to reading the deposition of Mrs. Tuttle is frivolous. The signature of the officer, "D. R. Conley, clerk, by Chas. R. Beatty, deputy," sufficiently indicates that Beatty was deputy clerk. This is the point made by the objection.

An exception was taken to the action of the court in refusing to permit the plaintiff David Larremore to testify.

We have considered all the questions raised upon the record material to the controversy. For the reasons indicated, we are of opinion the judgment should be reversed and the case remanded.

Reversed and remanded.

BURKE vs. TURNER.

[85 North Carolina, 500.]

GUARDIAN AND WARD.—ALLOWANCE TO FATHER FOR MAINTENANCE OF CHILD.

A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must before applying any of his ward's income to that end, procure the sanction of the proper court.

A guardian is not entitled to commissions on money collected and used by him in his own business, nor on debts of his ward paid to a firm of which the guardian is a member.

He should be allowed reasonable attorney's fees, paid in good faith.

Where one who is aware of the misapplication of trust funds by a guardian afterwards succeeds to that office, he is guilty of *laches* if he fails to charge the first guardian in his settlement with him with the sum so misappropriated.

CIVIL action on a guardian bond tried in Iredell Superior Court.

The defendant J. M. Turner was appointed the guardian of the *feme* plaintiff in the year 1866, and the other defendants are the sureties to the bond given by him as such. Prior to such appointment, one Benjamin Turner, her father, had been her guardian and had received portions of her estate. In 1866, in contemplation of a resignation of his guardianship, he applied to the County Court for the appointment of commissioners to audit his accounts, which was done, and after an examination into the accounts, the commissioners made their report to the court, the same being altogether an *ex-parte* settlement.

Upon his appointment the new guardian settled with his predecessor upon the basis of such *ex-parte* settlement, but the plaintiffs in this action allege that there was really due her a much larger sum than was thus ascertained and accounted for, and the object of the action is to fix the new guardian with a liability on account of his negligence in not calling the former to a stricter account.

After the pleadings in the case were completed, there was a reference to a commissioner to ascertain and report as well

what the defendant guardian ought to have received as what he did actually receive of the estate of his ward. The commissioner made his report, and it was upon exceptions to that report that the case was heard in the court below, and from the rulings of the court thereon both parties appealed to this court.

In their argument counsel treated the two appeals as one, and, for the sake of convenience, they are so considered.

The commissioner finds that the former guardian received for his ward prior to the war, as the proceeds of the sales of lands belonging to the estate of Garrett Pickler, deceased, a sum which, with interest to the 1st of September, 1866, that being the time of the settlement, amounted to \$3,477 56. That he also received from one Adams, administrator of David Pickler, deceased, on the 19th of December, 1862, in confederate money, the sum of \$3,475 60, with the scale value of which he charges him, as of that date and interest, \$1,725 36, which, added to \$3,477 56, makes \$5,202 92.

Credit was given him (as was done in the *ex-parte* settlement of 1866) for the board and clothing of his daughter and ward from 1859 to 1866,

amounting with interest to.....	\$1,024 19
For commissions on his receipts of \$5,202 92.....	260 15
And on his disbursements of \$1,024 19.....	51 10

Making a total of credits	\$1,335 44
Leaving a balance due the ward from former guardian	\$3,867 48

As to the first item of charge—to wit, the sum of \$3,477 56—arising from the sale of the lands of Garrett Pickler, his Honor finds that the lands so known belonged to the mother of the *feme* plaintiff who was living and covert at the time of the sale thereof for partition, and as she died without having converted the proceeds into personalty, leaving her husband (the said Benjamin) surviving her, he is as tenant by the courtesy, entitled to the use of the money during his life, and therefore the defendant guardian is not chargeable with the amount, and the plaintiffs appealed.

J. M. Clement, for plaintiffs.

D. M. Furches and Robbins & Long, for defendants.

RUFFIN, J. This ruling of his Honor was acquiesced in by the counsel who argued the cause for the plaintiffs in this court, and we have not therefore at all considered the question as to what might have been the liability of the new guardian for failing to secure the ultimate payment of the fund. The 2d, 3d, 4th, 5th and 6th exceptions of the defendants all related to this one item, and need not therefore be again adverted to.

Most of the exceptions to the commissioner's report had reference to the amount received from the administrator of David Pickler in confederate money and the rulings of the court below, and those exceptions furnish the principal grounds for the appeals taken by both parties.

The facts relating to the matter, as found by his Honor, are as follows: David Pickler died in 1862, leaving the *feme* plaintiff as one of his heirs at law and next of kin, and the said Adams having previously been his guardian, became his administrator. On the 19th day of December, 1863, he paid to Benjamin Turner, then acting as the guardian of said plaintiff, the sum of \$3,475 60 in confederate money, in full of her interest in said estate.

In December, 1862, confederate money was current amongst business men, and was taken in payment of debts by prudent trustees. The said guardian made no investment of the amount received, nor did he keep it as a separate fund for his ward, and in August, 1863, he used \$2,250 of the amount in hiring a substitute for himself in the confederate service. The defendant, J. M. Turner, had notice at the time of such misuse of the fund.

The first exception on the part of the plaintiff, was that the former guardian should have been charged with the whole amount of \$3,475 60 received from the administrator of David Pickler in good money, and not at its scaled value, as it was negligence to have received it in a depreciated currency in De-

cember, 1862, and especially as he was prompted to receive it, by a desire to use it for his own benefit, in the employment of a substitute. His Honor finding it to be a fact that the amount was received in good faith and the exercise of ordinary prudence, and relying upon the case of *Cummings v. Mebane*, 63 N. C. 315, overruled this exception.

This being an action on the guardian bond, such as under the old practice would have been a pure action at law, this court has no power to pass upon the facts involved, but is as much concluded by the finding of his Honor as by the verdict of a jury. *City of Greensboro' v. Scott*, 84 N. C. 184. And taking the finding to be true the exception was properly overruled.

So, too, with regard to the plaintiffs' second exception, his Honor finding that the confederate money was received in December, 1862, precludes all further inquiry into the matter, and the scale was properly applied as of that date. The plaintiffs' third exception was that the commissioner erred in allowing the former guardian credit for the various sums charged for the board and clothing of his ward—she being his own child whom he was bound to maintain. His Honor, upon the authority of *Walker v. Crowder*, 2 Ired. Eq. 478, sustained this exception, and the defendants assign this as one of the grounds of their appeal.

The case referred to fully sustains the ruling of the court. A father though he be the guardian of his child is not ordinarily permitted to charge for its maintenance or education. If able, he is himself bound to maintain his child, and if not so, he must, before being permitted to apply any portion of his ward's income to that end, procure the sanction of the proper court.

Their fourth exception was to the allowance of commissions to the defendant J. M. Turner, on the ground that he had failed to file his annual returns as guardian, and had been negligent of the interests of his ward in the settlement made with his predecessor, and even if allowed some commissions, it was insisted that he ought not to have them upon the sum of \$1,000, which it is conceded he used of his ward's money in his own business of manufacturing tobacco. This exception

should have been sustained as to the commissions on so much of his trust fund as the guardian employed in his own business. Commissions are given as compensation for the labor and care bestowed on the management of his ward's estate, or where debts are paid or money expended on the ward's account for the exercise of such skill and discretion as may be needed for the protection of the ward's interest in the transaction.

Should the guardian employ the fund in purposes of his own, seeking to make profit for himself (apart from any question of fraud that may arise) there is in such case no such labor performed, or skill exerted in behalf of the ward as needs to be compensated.

For the same reason commissions should not have been allowed on the several store bills paid to the firm of J. M. and A. Turner—the guardian being a member of that firm and acting as well for himself as for his ward in the matter. As to the credit allowed for the sum of \$113 paid to attorneys, his Honor finds that amount to have been paid in good faith, and if so, it does not seem to be excessive. *Whitford v. Foy*, 65 N. C. 265.

For the defendants it was excepted:

First, That the commissioner erred in going behind the settlement made by the former guardian with the commissioners appointed to audit his accounts by the County Court, so as to charge the defendant guardian with a larger sum than was accounted for in that settlement—there being nothing to show that the said defendant knew, or had reason to believe, that such settlement was not fairly and honestly made. Even if we should concede that there could be any exception made to the rule, that a guardian is liable not only for what he actually receives, but for what he ought to receive for his ward, we could not give defendants the benefit of it in this case. The defendant J. M. Turner, as found by his Honor and as is manifestly true, had full notice of the misapplication of the ward's estate by his predecessor with reference to its use in the employment of a substitute, and having such notice it was his duty to demand, and have a strict and true account.

Second, That it was error to charge the defendant with any

part of the sum of \$3,475 60, received by the former guardian in confederate money, in 1862, or if with any part thereof, with more than was actually used by said former guardian in hiring the substitute.

His Honor overruled this exception upon the strength of the rule laid down by this court in the case of *Shipp v. Hettrick*, 63 N. C. 319, and was fully warranted in so doing. Though not liable for receiving the confederate money in 1862, the guardian, Benjamin Turner, rendered himself chargeable with its value, by reason of his failure to invest it, and by his subsequent use of the greater part of it, as well as by his failure to keep it as a separate fund unmixed with other money.

There were some other exceptions filed by both parties which his Honor pronounced as too vague and indefinite to be properly understood by the court, and therefore overruled them. As they appear to us in the same light we make a like disposition of them.

The judgment of the court below is affirmed as to all matters, except as to the allowance of commissions to the defendant J. M. Turner upon the sum of \$1,000, of his trust fund, used in his own business, and upon the amounts paid, as store bills to the firm of which said defendant was a member, and with reference to these two items the account of the commissioner must be corrected by the clerk of this court, to whom this cause is referred for that purpose.

Judgment accordingly.

Allowances to father generally.—The general rule is that a father must support and educate his minor children out of his own estate.

On this has been engrafted an exception to the effect that where the father is unable to support his children, by reason of inability to earn sufficient, or by sickness or other cause, he may have an allowance made him out of any estate belonging to such children. *Harring v. Cole*, 3 Bradf. 348; *Watts v. Steele*, 19 Ala. 656; *Matter of Burke*, 4 Sandf. Ch. 617; *Beasley v. Watson*, 41 Ala. 284; *Pharis v. Leachman*, 20 Id. 663; *Alston v. Alston*, 34 Id. 15; *Sparhawk v. Buell*, 9 Vt. 41-71; *Patton v. Patton*, 8 B. Mon. 160; *Matter of Kane*, 2 Barb. Ch. 875; *Cruger v. Heyward*, 2 Dessaus. Eq. 94; *Newport v. Cook*, 2 Ashm. 832; *Meyers v. Meyers*, 2 McCord's Ch. 214-255; *Tompkins v. Tompkins* 18 N. J. Eq. 808; *Buckley v. Howard's Admr.* 35 Tex. 565; *Har-*

land's Case, 5 Rawle, 828; Godard v. Wagner, 2 Strobb. Eq. 1; Dupont v. Johnson, Bailey's (S. C.) Eq. 274; Johnson v. Johnson, 2 Hill's Ch. 277; Griffith v. Bird, 22 Gratt. 78; Evans v. Pearce, 15 Id. 518; Edwards v. Davis, 16 Johns. 281; Walker v. Crowder, 2 Ired. Eq. 478; Clarke v. Montgomery, 23 Barb. 464.

In Haase v. Roehrscheid, 6 Ind. 66, the court, applying the foregoing rule, refused an allowance to the father for support, but made one for the education of the child, referring to 2 R. S. 1852, page 824, sections 6 and 9, which provides that if the "father is unable or fails to support such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify."

In Myers v. Myers, 2 McCord's Ch. 214-255, a similar ruling was made, based on the fact that the testator had provided a fund for education but had said nothing as to maintenance.

Allowances where father able to support.—As to whether the father is entitled to an allowance out of a child's estate when he is possessed of sufficient means to properly support and educate him, the authorities are not uniform.

In Pearce v. Olney, 5 R. I. 269, a devise was made in trust to invest, and "in the discretion of said trustee to expend and pay out a portion of the whole of said balance for the support and education of R. F. O., as to him shall seem most expedient, until said R. F. O. shall arrive at the age of twenty-one years."

Ames, C. J., said: "The obligation of a father to support his minor child is undoubted, notwithstanding the possession by the child of property applicable to his support. * * * Such an obligation is, however, from its very nature, limited by the ability of the father to perform it."

A similar conclusion was reached in Hines v. Mullins, 25 Ga. 696. It does not appear from what source the minor's estate was derived.

In Buckley v. Howard's Adm'r, 35 Tex. 565, the minors had estates derived from their mother by will—and an allowance was refused the father. From the mother's will, as set out in Walker v. Howard, 84 Tex. 479, it appears that she appointed her husband guardian and devised her share of their common estate to her children, directing only that it should be kept together and prudently managed by her husband.

In Morris v. Morris, 15 N. J. Eq. 289, it appeared that the parent was abundantly able to support his child, and the ordinary declined making an order to sell the infant's lands for their support, although it was averred that the rents and income of the estate were insufficient for the minor's support, saying, "although the language of the act is" if the personal estate and rents and profits of the real estate be not sufficient, "it was never the intention of the act that when the infant was abundantly provided from other sources for his maintenance and education other than his own real and personal estate, yet, because his own real and personal estate were not sufficient for the purpose, the court might order a sale of his real estate."

In Dawes v. Howard, 4 Mass. 97, the father, as guardian, received some legacies left his children, which he applied to their support, but his action

was disapproved of, *Parsons, C. J.*, stating "where minor children have property of their own, the father is, notwithstanding, bound to support them if of ability."

A similar statement on the same facts is made by the court in *Haglar v. McCombs*, 66 N. C. 845.

In *Presley v. Davis*, 7 Richard. Eq. 105, the infants had a separate estate owned in their own right. *Wardlaw, Ch.*, said: "A father is bound to maintain his infant children from his own estate, however ample may be their separate resources, and no allowance for this purpose will be made to him out of their estate."

In *Tompkins v. Tompkins*, 18 N. J. Eq. 803, it is stated to be the "settled rule" that the father, if of sufficient ability, must support his children, "notwithstanding they may have estates of their own, even when such estates are given expressly for their maintenance."

To a contrary effect are the following cases:

In *Matter of Burke*, 4 Sandf. Ch., 617, the father of two infants having large incomes from separate estates, who was unable on his own income, with the addition of a board charge from the children, to keep house in a style befitting the fortunes of the children, was allowed a further sum to maintain a home for them, the court saying: "The court in cases like this endeavors to pursue the course which is best calculated to promote the permanent interest, welfare, and happiness of the children who come under its care, and these are not always promoted by a rigid economy in the application of their income, regardless of the habits and associations of their period of minority."

This case is criticised in *Walsh v. McKnight*, 28 N. J. Eq. 136-144.

In *Nimble v. Dodd*, 2 Tenn. Ch. 500-502, the chancellor says, if the father "have the means, but the income of the children is larger than his own, the modern usage is to make an allowance to the parent for maintenance."

In *Matter of Marx*, 5 Abb. N. C. 224, the father was appointed administrator of his wife's estate, and applied to the support of his children part of the property they were entitled to. His action was approved; *Calvin, Surrogate*, saying: "It is a mistake to suppose that a parent is under obligation to support his minor children where they have property that may be applied for that purpose."

In *Griffith v. Bird*, 22 Gratt. 73, the father made no claim for maintenance during his lifetime, nor in his accounts as guardian, and the court refused to sanction such a claim by his administrator.

A similar ruling was made in *Evans v. Pearce*, 15 Gratt. 513.

Allowances out of funds set apart to support.—There is another class of cases where the father is of sufficient ability to support his children, yet seeks an allowance out of a fund set apart by will or contract for the support or education of such children.

Hughes v. Hughes, 1 Brown's Ch. 887, and *Andrews v. Partington*, 3 Brown's Ch. 60, are cited to show and hold that no allowance can be made under such circumstances.

But the principle of these cases has been departed from.

In *Hoste v. Pratt*, 8 Vesey, 780, maintenance was allowed without inquiring as to the parent's ability, "for there was an express direction for maintenance;" the Solicitor General, as *amicus curiæ*, observing that Lord Thurlow had changed his opinion as to *Andrews v. Partington*, in a case subsequent thereto.

In *Reeves v. Brymer*, 6 Vesey, 425; *Sisson v. Shaw*, 9 Id. 286; and *Maberly v. Morton*, 14 Id. 499, the practice was said to be altered since *Andrews v. Partington*, and that case is said to be greatly shaken.

In cases where the child's income has been derived under marriage settlements, the courts have frequently made allowances. *Mundy v. Earl Howe*, 4 Brown's Ch. 224; *Stocken v. Stocken*, 4 Simons, 152; *Meacher v. Young*, 2 M. & K. 490; *Thompson v. Griffin*, Cr. & P. 317; *Ransome v. Burgess*, L. R. 3 Eq. 773.

In these cases a distinction is drawn between cases where the property of the children is derived from the bounty of a stranger and those in which they are entitled to it under the marriage settlement of their parents.

On this point Lord Cottenham, in *Thompson v. Griffin*, *supra*, says: "It seems to me that the distinction between these two classes of cases has been carried quite as far as can be justified upon principle. In some of them it has been said, that in the case of a marriage settlement the father is a purchaser, and therefore entitled to an allowance for the maintenance of his children, and thereby to be relieved from the burden which the law throws upon him of maintaining them himself. No doubt he is so, if the contract contained in the settlement gives him such benefit, but before he can be entitled to it, he must show that such was the contract. So in the case of a legacy from a stranger, if the intention to be found in the construction of the will appears to have been that the father should have such a benefit the court is bound to give it to him. In both cases, the question is one of construction and intention."

In *Meyers v. Meyers*, 2 McCord's Ch. 254, 255, the chancellor refused to make the father an allowance for support, adding: "But with respect to the expenses for their education, the case is different. The testator, having provided that the expenses of their education should come out of the profits of his estate, created a charge thereon, and the defendant must be allowed a discount out of the rents and hire *pro tanto*."

In *McKnight's Executors v. Walsh*, 23 N. J. Eq. affirmed on appeal, 24 Id. 498, the testator directed his executors to invest a sum of money and pay the interest to his daughter, to her separate use for life, and after her decease for any of her children; he, the executor, appropriating and expending the legal interest of said sum towards the proper maintenance and education of such children, and to pay them the principal on their attaining twenty-one. The chancellor, at page 142, after stating it to be the general rule that a father is bound to support his infant children, continues: "But in this case the testator directed this income to be appropriated for that purpose, and no order was required while the expenditure was within the direction." One-half the yearly income was allowed the father.

In *Freeman's Executor v. Colt*, 27 Hun, 447, the mother, by her will, left

two-thirds of her real and personal estate to her executors, of whom her husband was one, in trust to pay the income thereof, to and for the support, maintenance, and education of any child surviving her, and the principal to go to such child on majority. One child survived the testatrix, and the father, although a man of independent means, was allowed \$1,000 for her support in her second year, a like sum for a like object during her third year, and \$500 during the fourth year, it appearing that the child was in ill health and required great care. The court, at page 448, say: "Her (testatrix) direction was positive that the income of this two-thirds should be devoted to the support, maintenance, and education of the child, and under this decided and unequivocal direction, her father, as executor, was clearly authorized to make that disposition of the income of this portion of the estate so far as it was required for this purpose. An authority of this nature has been derived from similar clauses contained in marriage settlements and antenuptial agreements. It is true that this authority in these cases has been derived from the fact of a contract having been made upon the subject; but no greater effect can reasonably be attributed to such terms when they may be employed in such an instrument, than should be given to them when the same unequivocal use has been made of them in a will. * * * The reason of the rule includes all cases alike where such a provision has been made, and under the statute of this State requiring the intention of the person making the will to be carried into effect, the principle may properly be made as extended as this in the administration of the laws of this State."

Allowance to mother.—The obligation of the mother is not so extensive, and it has been stated that where minor children "have the means for their own support, or provision has been made for that purpose, or her children can maintain themselves, the law does not charge the mother with their support." *Mowbry v. Mowbry*, 64 Ill. 383-386; *Whipple v. Don*, 2 Mass. 415; *Wilkes v. Rogers*, 6 Johns. 566; *Osborne v. Osborne*, 2 Fla. 360; *Heyward v. Cuthbert*, 4 Dessesau. Eq. 445.

In *ex-parte* *Davison*, 6 Paige, 186, testator bequeathed a fund to his widow, charged with the maintenance of his minor children, and it was held that no allowance could be made her out of their estates until such fund was exhausted.

Allowances to father or mother for past maintenance.—A court of chancery will also make allowances for past maintenance. The same test prevails as is applied in determining whether a future allowance should be made. The court, however, requires very clear proof of the necessity and moderateness of the charge, and the burden of proof is on the party making the same. *Harring v. Coles*, 2 Bradf. 849; *Welch v. Burris*, 29 Iowa, 186; *Matter of Bostwick*, 4 Johns. Ch. 104; *Matter of Burke*, 4 Sandf. Ch. 617; *Stewart v. Lewis*, 16 Ala. 784; *Alston v. Alston*, 84 Id. 15-27; *Montgomery v. Givan*, 24 Id. 565; *Holtzman v. Castleman*, 2 McArt. 555.

Where allowances have been asked for past maintenance by a mother, it has been held that the mere fact she supported her children is not enough.

The presumption is, that she did so gratuitously. *Seitz's Appeal*, 87 Penn. St. 159; *Whipple v. Dow*, 2 Mass. 415.

But in *Stewart v. Lewis*, 16 Ala. 734, payments for board to the mother were allowed, although it did not clearly appear that she indicated an intention to charge for board as far back as her accounts extended.

Out of what allowances may be made.—Allowances may be made out of principal of the minor's estate. *Matter of Bostwick*, 4 John. Ch. 104; *Osborne v. Osborne*, 2 Fla. 360.

In *Newport v. Cook*, 2 Ashm. 332, an allowance was made out of the interest of a vested legacy among grandchildren who had a common interest in the fund.

In *Tompkins v. Tompkins*, 18 N. J. Eq., 303, it is said allowances out of an infant's income may be made "even when the property is bequeathed to them with directions to be accumulated during minority."

FLOYD vs. CAROW.

[88 New York, 560.]

FORCE OF GENERAL RESIDUARY DEVISE IN INTERESTS NOT SPECIFICALLY DISPOSED OF.

A general residuary devise carries every real interest of the testator whether known or unknown, immediate or remote, unless clearly excluded.

Testator, after certain specific legacies, gave the residue of his real and personal estate to his executors, in trust, to pay the income to his wife for life, and at her death to assign, transfer and set over" all his "real estate" not therein disposed of, to her appointees, and failing appointment to her heirs at law. At his wife's death he devised certain premises to two legatees for life, and the fee on their death to their issue then surviving. Such devisees were unmarried at testator's death, and thereafter died without issue. *Held*, that the two devisees left in testator a contingent reversion in fee expectant on the determination of the life estates and failure of issue, which went to the appointees of testator's widow.

APPEAL from the judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, affirming a judgment at Special Term in defendant's favor.

This action was brought by plaintiff, who claimed as sole heir at law of Robert Kermit, deceased, to recover possession of certain lots in the city of New York.

The said Robert Kermit left a will, which in the first clause stated it to be his desire to make "a suitable and proper disposition of such worldly estate" as he should leave behind him. After various specific legacies, the will contained these clauses:

"*Sixth.*—All and singular the rest, residue and remainder of my property and estate, real and personal, of every name, nature and description whatsoever, and wheresoever situated, I give, devise and bequeath to my executrix and executors, hereinafter named, and the survivor of them, and the successor or successors of them, to have and to hold the same, and every part thereof upon the trust, and for the uses and purposes following, to wit: *First.* To manage and improve the said real estate, at their best discretion, and to rent and lease the same for such terms and periods as they may deem most advantageous, and to collect, demand and receive the rents, issues and profits of the same, and every part thereof, except only the dwelling-house now known by the number fifty in East Fourteenth street, in the city of New York, in which I now reside, and all and singular the appurtenances thereof, which dwelling-house, with the appurtenances, my said wife is to be at liberty to use for her own residence and occupation free of all rent, during her natural life, in case she shall upon my decease, or at any time or times thereafter, elect to use and occupy the same, without accountability to any person whatever for such use and occupation thereof by her. But in case my said wife shall elect to reside elsewhere, then the said trustees are to let the said premises, and to collect and receive the rents and profits thereof, in like manner with the rest of my real estate, hereinbefore referred to. *Second.* To invest all and singular the said personal property, from time to time, as a reinvestment thereof may become necessary or judicious, in bonds and mortgages on productive property, in the city of New York, or in the stocks of the United States or of the State of New York, as they may deem most safe, productive and advan-

tageous, and from time to time to change the investments thereof in their discretion, and to collect, demand, and receive the interest, dividends and other annual income of such personal property. And in case they shall deem it expedient at any time to foreclose any mortgage held by them in trust, as aforesaid, I hereby authorize and empower them, in their discretion, to buy in the mortgaged premises, or any part thereof, and to hold and manage the same in like manner with the other real estate aforesaid, and to sell and dispose of such mortgaged premises so bought in, when and if they shall deem it expedient and advantageous, on such terms and in such manner, at public or private sale, for cash or on credit, as in their judgment shall seem best, and to make, execute and deliver good and sufficient deeds of conveyance therefor. *Third.* To pay out of the rents, profits, interests, dividends, or other income of my said property and estate, all taxes, assessments and other lawful charges and impositions thereupon, all premiums for the insurance thereof, and all proper expenses for the repairing, altering or rebuilding of the improvements erected on real estate aforesaid, including the said dwelling-house in East Fourteenth street (whether the same be occupied by my said wife, or rented so as to be productive), and all costs, charges, expenses and disbursements properly incurred by them in the execution of the trust aforesaid, including their lawful commissions in the premises. *Fourth.* After deducting from the said income all and singular the charges and expenses aforesaid, to pay to my said wife, for and during the residue of her natural life, in equal quarter yearly payments, upon her separate receipt, the whole residue of said income; the first of said payments to be made within three calendar months after my decease. And upon the death of my said wife to assign, transfer and set over the said personal property, and the securities on which the same may be invested, and every part thereof (including any real estate bought in upon the foreclosure of any mortgage, as hereinbefore provided), and all and singular my real estate not herein and hereby otherwise disposed of, to and among such person or persons being relatives by blood or marriage of myself or of my said wife, and in such shares or

portions, and on such conditions and limitations as my said wife may direct in and by her last will and testament, or by any instrument of appointment in the nature thereof, duly executed by her, with the formalities required by law for devising real estate in fee, and bequeathing personal property. And in default of such will or such appointment, then to and among the then heirs at law and next of kin of my said wife, in like manner as if the said property and estate had belonged to her absolutely in her own right, according to the laws of the State of New York then regulating the descent of real estate, and the distribution of personal property.

"*Seventh.*—Upon the death of my said wife, I hereby give and devise the real estate aforesaid in manner following, to wit: * * *

"To Laura F. Carow, the daughter of Isaac Carow, late of the city of New York, the premises situated in Greenwich street, running through to Washington street, in the city aforesaid, known by the numbers eighty-six Greenwich street and ninety-one Washington street, with the appurtenances, to have and to hold the same to her for and during her life, and on her death to her issue then her surviving, and the issue of such of them as may then have departed this life, the issue of any such deceased child, taking *per stirpes* and not *per capita*, in fee-simple absolute. * * *

"To Sarah Elizabeth Sanderson, the daughter of the said Edward F. Sanderson, the store and premises in Pearl street, running through to Stone street, in said city, and known as numbers seventy-nine Pearl street and forty-six Stone street, aforesaid, with the appurtenances, to have and to hold the same to her for and during her life, and on her death to her issue then her surviving and the issue of such of them as may then have departed this life, the issue of any such deceased child, taking *per stirpes* and not *per capita*, in fee-simple absolute."

The two devisees named as above in the seventh clause were unmarried at the time of the making of the will and of the testator's death. They both died thereafter without issue. The premises in controversy are those described in the devises to them. Defendant claimed under the will of Ann Kermit,

the widow of said Robert Kermit, by which an appointment was made as prescribed by the will of the latter.

Alfred Roe, for appellant.

Henry J. Scudder, for respondent.

ANDREWS, Ch. J. It is an established rule in the construction of wills, that unless a plain intention to the contrary appears, a general residuary clause operates upon, and carries to the residuary devisee all reversionary interests in lands owned by the testator at the time of making the will, not embraced in other dispositions, whether such reversionary interests are immediate or contingent and remote; and the rule is the same whether the estate of the testator was a reversion only, or the reversion was created by the devise in his will of a less interest than a fee, or arises from a contingent limitation of the fee which may be defeated by the non-happening of the event upon which the fee is limited. (*Doe v. Weatherby*, 11 East, 322; *Doe v. Fossick*, 1 Barn. & Ad. 186; *Doe v. Scott*, 3 Maule & S. 300; *Bowers v. Smith*, 10 Paige, 193; *Youngs v. Youngs*, 45 N. Y. 254; *Hayden v. Stoughton*, 5 Pick. 528; 1 Jarman, 611.)

Where the residuary devisee is another than the heir, the heir is excluded from taking such reversionary interest, because there is an operative devise away from him. But the intention is the controlling consideration, and a particular interest, or estate, will not pass by a residuary clause when it appears from other provisions of the will that it was the intention of the testator to exclude such particular interest or estate from the residuary gift. (*Strong v. Teatt*, 2 Burr. 912; *Hambleton v. Darrington*, 36 Md. 434.) The intention of the testator to restrict the operation of the residuary clause, cannot, however, be deduced from the mere absence of words in the will, denoting, that a particular interest or estate upon which the residuary clause is claimed to operate, was in the contemplation of the testator when the will was made, or from the fact that the reversion was a mere expectancy dependent upon the failure

of issue or other improbable contingency. A general residuary devise carries every real interest, whether known or unknown, immediate or remote, unless it is manifestly excluded. The intention to include is presumed, and an intention to exclude must appear from other parts of the will, or the residuary devisee will take.

The claim of the plaintiff as heir of the testator, Robert Kermit, to the premises in controversy, is defeated by the application of the rule of construction to which we have referred. The separate devises of the premises in the seventh clause of the will to Laura F. Carow and Sarah Elizabeth Sanderson upon the death of the testator's wife, of a life estate to them respectively, and of the fee on their death to their issue then surviving, was not an absolute disposition of the whole estate of the testator in the land. The devisees for life were unmarried at the date of the will and at the death of the testator. The estates devised to the unborn issue of the life tenants were contingent remainders in fee, depending upon a double contingency, viz.: the birth of issue and their survivorship. There was left in the testator a contingent reversion in fee, expectant upon the determination of the life estates, and the failure of issue of the life tenants which was not embraced in the specific devises in the seventh clause. The life tenants died, after the death of the testator, without issue. Upon their death, the contingent reversion of the testator in the lands devised to them and their issue, was changed into an absolute fee, which, not having been specifically devised, descended to the plaintiff as heir-at-law, unless it passed to the appointees of the testator's wife under the sixth clause of the will. We think that under the sixth clause the appointees of the wife took the reversionary interest of the testator in the lands and the fee upon the death of the life tenants. The trust created by the sixth clause comprehended all the rest, residue and remainder of the testator's real and personal property not disposed of by the previous clauses, and included the premises in controversy. It was in effect a trust for the management of the estate, and to receive and pay over the rents, profits and income to the testator's wife for life, and upon her death the trustees

are directed "to assign, transfer and set over" the personal property and securities, and "all and singular my" (his) "real estate not herein and hereby qtherwise disposed of," to the appointees of his wife, or in default of appointment, to her heirs and next of kin. The words "real estate" in legal signification include all interests in land, whether in possession, reversion or remainder. They are used in the statutes as co-extensive in meaning with lands, tenements and hereditaments. (1 R. S. 750, § 10, and 754, § 27.) The reversion in the testator, though contingent and remote, was real property, and was comprehended in the words "real estate" as used by the testator in the residuary gift. (See *Jackson v. Parker*, 9 Cow. 73.) The exception in the sixth clause from the operation of the power of appointment, of real estate not otherwise disposed of by the will, cannot reasonably be construed as excluding the reversionary interest in the land in controversy. The exception is not of any specific tract or parcel of land, but of real estate not otherwise devised. The only specific devises of the lands in question (except a devise upon the contingency of issue being born to the testator), are found in the seventh clause, and these devises left a contingent reversion in the testator. This contingent interest is not otherwise disposed of than by the sixth clause, and is therefore included in the residue upon which the power of appointment operates. The counsel for the plaintiff refers to the direction to the trustees, to "assign, transfer and set over" the personal estate to the appointees of the wife, or to her heirs or next of kin, in default of appointment as indicating that the testator had in contemplation, and was dealing with estates in possession, and not with remote and contingent reversionary interests. These words were primarily and appropriately used with reference to the personal property and securities. But they are also applied to the real estate. The testator seems to have supposed that a transfer from the trustees to the appointees of the wife, or to her heirs of the real estate, was necessary to complete their title. While it may be admitted that the words referred to have a more precise and appropriate application to the delivery of the possession of real property, than to a conveyance of a remote and contingent in-

terest, this is, we think, too slight a circumstance to justify a departure from the general rule of construction. It does not afford that plain evidence of an intent to exclude the reversion from the gift of the residue which the decisions require. The intention of the testator to dispose of all his estate is not left to presumption merely. He declares, in the introductory clause of the will, that he was "desirous of making a suitable and proper disposition of such worldly estate as I may leave behind me." His intention to exclude the heir from any participation in his estate, except such part as his wife in her discretion might appoint, is also inferable from the will. While these circumstances are not decisive against the claim of the heir, as the heir takes, even against the intention of a testator, unless there is a valid gift of the estate to others, they are nevertheless entitled to some weight in construing a residuary clause; and when the meaning is obscure, they afford a clue to the interpretation.

The final point is not tenable. The rule that if the gift of a share or interest to one of several residuary legatees or devisees fails, the share of the residue itself so failing does not go in augmentation of the residue to the other residuary legatees or devisees, but descends to the heir-at-law or next of kin of the testator, is founded upon a construction of the meaning of *residue*, which unexplained means that of which no effectual disposition is made other than by the residuary clause. (*Skrymsher v. Northcote*, 1 Swanst. 566.) But this rule has no application to the will in question, because the intention of the testator, indicated by the language of the sixth clause, was to vest the alternative fee in the lands devised by the seventh clause, in the appointees of the wife or her heirs, in the event of a failure of issue of the life tenants. The learned and elaborate opinion at the Special Term renders a more extended discussion here unnecessary.

The judgment should be affirmed.

All concur.

Judgment affirmed.

LOWELL vs. ESTATE OF FRENCH.

[54 Vermont, 193.]

DIVIDENDS ON NOTE ALLOWED AGAINST SURETY'S ESTATE AFTER
PAYMENTS ON ACCOUNT BY PRINCIPAL.

When a note is allowed by the commissioners against the insolvent estate of a deceased surety, and afterwards a dividend is paid on the note by the trustees of the insolvent principals, who have assigned, in the final distribution of such surety's estate by the Probate Court, the owner of the note is entitled to a dividend *only on the balance*, and not on the amount so allowed.

HEARD at the March Term, 1881, Essex county. Appeal from the Probate Court, and the decree of that court was affirmed.

The facts appear in the opinion.

Frye, Cotton & White and *Ossian Ray*, for the plaintiffs.

Poland, for the defendant.

ROYCE, Ch. J. N. W. French in his lifetime signed or became liable upon the notes which were allowed by the commissioners upon his estate as surety for the French Brothers. After the allowance, the French Brothers, who were principals upon said notes, made payments to the appellants, which were indorsed upon said notes. French Brothers became insolvent after said allowance was made; and made an assignment in Maine, and the payments made to the appellants were made by the trustees under said assignment. N. W. French's estate was insolvent; and in the decree of distribution made by the Probate Court the payments, so made to the appellants, were deducted from the allowances made by the commissioners; and the amounts remaining due were taken as the basis upon which the dividend was made. An appeal was taken from the decree so made, the appellants claiming that a dividend should have been decreed to them upon their claims as allowed by the commissioners. It was the primary duty of the French Brothers

to have paid the notes, and thus relieve the surety and his estate from all liability ; and it is admitted that if the payments had been made before the notes were presented for allowance, only such sum could have been allowed as appeared to be due. In the distribution of an insolvent estate we see no reason why a payment made by the principal after the allowance should not be treated in the same way that it would have been if made before. In both cases the payment reduces the liability of the estate. While it is true that the payees had the right to regard the surety as a principal, and to enforce his liability as a principal until they had obtained full satisfaction, yet, where there is only a limited fund from which to obtain satisfaction, and the question is made how that fund shall be distributed, creditors, whose claims are equal in right are entitled to share equally in such distribution. Our statute upon the subject of the distribution of insolvent estates requires that that rule shall be observed. If the rule claimed by the appellants should be adopted, no such equality could be preserved ; and creditors might obtain dividends upon claims that the estate was not liable for, thus being preferred to other creditors whose claims against the estate were unquestioned. This would be in conflict with all the statutory provisions pertaining to the settlement and distribution of insolvent estates. The payment made to the First National Bank of St. Johnsbury, and which was deducted from the allowance before a dividend was decreed to it, was made from the funds of the principals, so that its case is, in principle, like the cases of the other appellants. In *In re Howard, Cole & Co.*, a well-considered case decided in the U. S. District Court, 4 Nat. Bank. Reg., it was held that where the holders of notes, after they had proved the full amount of their claims against the bankrupt estates of the indorsers, received part payment from the makers, they were entitled to dividends only on the amount due when the dividends were declared.

There was no error in the judgment of the County Court, and it is affirmed, and ordered to be certified back to the Probate Court.

DILL vs. WISNER.

[88 New York, 153.]

ACTION TO CONSTRUER WILL.—EXECUTOR TO MAINTAIN MUST BE TRUSTEE.—TRUST OR LIEN.

An executor cannot maintain an action for the construction of a clause of a will disposing of real estate, unless he is invested with a trust under the will in reference to the subject-matter of the devise.

A devise by testatrix of all her real estate, charging the same with the payment of all "just debts, funeral and testamentary expenses, and all the pecuniary legacies," creates no trust, but only a lien for the payment of debts.

APPEAL from a judgment of the General Term of the Supreme Court reversing a judgment at Special Term and dismissing plaintiff's complaint.

This action was brought by plaintiff, as executor of the will of Rachel J. Miller, deceased, and individually to obtain construction of the said will, and declaring the rights of legatees, and the duty of plaintiff under it.

The will in question, after various legacies and specific bequests, and a bequest of all the residue of the personal property of the testator, devised all of his real estate to the plaintiff and Matthew J. Dill in equal shares with this proviso, "charged, however, with the payment of all my just debts, funeral and testamentary expenses, and all the pecuniary legacies by me herein given and bequeathed." Plaintiff and another were named as executors, but plaintiff alone qualified.

The court found that the devisees refused to take the real estate under the devise, renounced all claim thereto and by deed poll duly executed and recorded released the same to the heirs at law. Most of the personal property specifically bequeathed was delivered to the legatees, and the court found that the executor had no funds in his hands to pay debts, testamentary expenses or legacies, and that the only property remaining was a farm of which the testatrix died seized, and a small amount of personal property specifically bequeathed but not delivered to the legatees.

Charles H. Winfield, for appellant.

D. M. De Witt, for respondent.

MILLER, J. The testatrix by her will devised all her real estate to persons therein named, and charged the same with the payment of all just debts and funeral and testamentary expenses, and all the legacies previously given and bequeathed. This devise, we think, did not create a trust in the executors which authorized the bringing of an action for the construction of the will and for directions and instructions as to the same. There are no words of trust in the will or power to execute a conveyance or to sell, and no directions or authority conferred upon the executors to distribute moneys realized upon a sale in payment of debts or legacies. It is plain in its terms and free from ambiguity, and although it imposes a lien or incumbrance upon the lands for the payment of the debts, it creates no trust. No express power being given to the executors to sell under our system of administering the property of decedents for the payment of creditors, no such power can be implied from the mere charge of the debts and legacies upon the lands devised. (*In re Fox*, 52 N. Y. 530, 536.) We have examined the authorities cited by the learned counsel of the appellant to sustain the position that the charge created a trust, and that the executor whose duty it is to pay the debts will be regarded in equity as a trustee, and the beneficiaries as creditors and legatees, as *cestuis que trust*, and none of them hold that, under circumstances like those which are here presented, a trust is created in the executor. It is no doubt true, that when lands are charged in a devise with the payment of debts they may be made available for that purpose, but with this the executor has nothing to do unless authority is conferred upon him, and it is for the creditor to take steps to enforce such a lien. When the debts are made a charge upon land, even the surrogate has no power to order a sale until the creditor has exhausted his remedy under the charge. (2 R. S. 102, § 14; Code, § 2749.) The learned counsel for the appellant claims that the land must be regarded as money, as constituting a

fund for the payment of debts and legacies charged upon it, and is denominated equitable assets in the hands of the executor for such payment. This is undoubtedly the rule when the land is placed under the control of the executor who has power to sell the same and distribute the proceeds, but no such case is here presented, and none of the cases cited to sustain this proposition are analogous.

The position taken that it makes no difference whether the devise directs the sale of real estate for the payment of debts, or only charges the real estate therewith, is also untenable. We have also carefully examined the authorities cited in this connection, and are unable to find that any of them uphold the doctrine contended for. In all the cases where the executor is vested with any such power, trustees who are named in the will are invested with authority, or it is fairly to be implied from the language employed that it was intended to create a trust in the executor, and no case is cited where the charge is made upon the land, and there is an absolute devise of the same to a devisee which sanctions any such rule. In some of the cases language is employed which renders the devise of no avail without such an implication, or leaves it as a matter fairly to be inferred that such was the intention, but none of them involved the precise question now considered. It should also be noticed that many of the authorities cited refer to the rights of purchasers upon sales; but not one of them presents the case of a naked devise as in the case at bar, with no accompanying words which lead to the conclusion that the executor was vested with any such power. The nearest approach to the position contended for will be found in 2 Perry on Trusts (§ 803), where it is laid down. "In *Doe v. Hughes* the court held that a *charge* had no operation in law, but must be enforced in equity, from which it follows that the executors could not sell without a license or decree of the court. This case has been much criticised, on the ground that where a direction to sell and make payments is given, but no person is named, the executors have the power to sell by implication; and so it is thought that where there are charges upon real estate there is an implied power of sale in the ex-

ecutors. Mr. Lewin thinks that *Doe v. Hughes* was a sound decision upon the *legal* question, but that the executors have an equitable power of sale, and the holders of the legal title are trustees for them," and numerous cases are cited in the notes to the text quoted. It will be seen that the concluding portion of the citation lays down the doctrine as stated by Mr. Lewin in his work on Trusts; that the holders of the legal title are trustees for the executors. Some of the authorities last referred to are cited *In the Matter of Fox (supra)*, and it is there said, by Andrews, J., that Sugden on Vendors speaks of these latter decisions, which are in conflict with *Doe v. Hughes*, "as contrary to the received opinion, and the law upon the point has since been settled by statute."

I have not deemed it necessary to discuss in detail the numerous cases which are cited by the appellant's counsel. They involve a wide field of investigation as to the effect of a charge upon land for the payment of debts and legacies, and as to the trust, if any, created thereby, as well as the authority of an executor in such a case, and it is sufficient to say that the conclusion is inevitable, after a full consideration of the authorities, that no trust was in the executor under the devise in question, nor had the executor any authority to convey the equitable title while the legal title vested in the heir-at-law.

The right of an executor to commence an action for the construction of a will of real estate depends entirely upon the question whether he is invested with a trust under the will in reference to the subject-matter of the devise, and it is only in such cases that a court of equity, on the assumption of its right of supervision over trusts and trustees, will assume jurisdiction. (*Post v. Hover*, 33 N. Y. 593; *Bowers v. Smith*, 10 Paige, 193, 200; *Chipman v. Montgomery*, 63 N. Y. 221; *Monarque v. Monarque*, 80 Id. 320, 325; *Bailey v. Briggs*, 56 Id. 407, 413.) In the last case cited it is said, by Folger, J., "It is when the court is moved in behalf of an executor, trustee or *cestui que trust*, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts." As we have

seen, the case at bar is not within the rule laid down. The executor here had no interest whatever in the real estate, and no duty devolved upon him in relation to the same. Nor did the refusal of the devisees to accept the devise in the will or their renunciation impose upon him any trust. By accepting the devise the devisee would become liable at least to a certain extent for the debts and legacies chargeable upon the land. (*Gridley v. Gridley*, 24 N. Y. 130, 135; *McLachlan v. McLachlan*, 9 Paige, 534; *Kelsey v. Western*, 2 N. Y. 500; *Harris v. Fly*, 7 Paige, 421.) And by the renunciation of the devisee no trust was imposed upon the executor which did not exist under the will, and he has nothing to do with the land, and had no right to the use, occupation or rents arising from the same. (*Tole v. Hardy*, 6 Cow. 333, 339.) It descended to the heir-at-law, and was chargeable in equity with the payment of debts and legacies. (*Birdsall v. Hewlett*, 1 Paige, 32; *James v. James*, 4 Id. 115; 4 Kent's Com. 433; Will. Eq. Juris. 489.) Whether the charge was in aid or in exoneration of the personal estate cannot affect the position or authority of the executor. And while the personal estate might be first liable as to the creditor, he still had a remedy under the charge.

The executor having no status as a trustee, or under a power in trust, as we have seen, to bring the action, there is no ground upon which the suit can be maintained, unless it may be done for the reason that the executor having incurred testamentary expenses, he had a lien upon the real estate for the same, and is entitled to bring an action to enforce such lien. If the executor's account had been adjusted, and a decree of the surrogate had adjudged the amount due him, and upon demand the heir-at-law had refused to pay the same, the action might lie to enforce such a claim. But no such case is stated in the complaint, and there is no proof of any neglect or refusal of the heir-at-law to discharge the charge on the land in this respect.

As the action cannot be maintained it is not necessary to consider whether a marshaling of assets can be made. Nor are we called upon to determine whether the charge on the

land is in exoneration or in aid of the personal property as well as some other question raised, as the total amount of debts and legacies as shown exceed the value of the land, as both real and personal estate will most probably be needed to pay the same with the funeral and testamentary expenses, and it is not very material whether the real estate is first chargeable, or whether it is in aid of the personal property. It is insisted by the counsel for one of the legatees, who is a defendant in the action, that the right to a sale does not rest upon the existence of any trust or power in the executor, but upon the existence of liens upon the land enforceable in equity. Although as a legatee she might enforce her rights by an action, it is difficult to see how it can be done in this action which is brought by the executor, and upon entirely a different theory. Even if the defendant might aid the plaintiff's case on the ground claimed, inasmuch as the plaintiff, as already stated, cannot maintain his action to obtain payment of his testamentary expenses on that ground, because he has never demanded payment of the same, it is not apparent how he can be aided by the defendant, who stands in no better position. In regard to the question of costs, the plaintiff sued as executor and individually, and it does not appear that they were imposed upon him herein individually by reason of any mismanagement of bad faith. Be that as it may, however, in an equitable action it is entirely discretionary with the General Term to determine as to its costs, and with that discretion as a general rule this court will not interfere. (*Herrington v. Robertson*, 71 N. Y. 280; *Brundage v. Brundage*, 60 Id. 552.)

The judgment appealed from should be affirmed.

All concur, except TRACY, J., absent.

Judgment affirmed.

READ vs. CATHER'S ADMINISTRATOR.

[18 West Virginia, 263.]

WHEN LEGACY CHARGE ON LAND.

Whether legacies are a charge upon real estate devised is a question of intention upon the part of the testator.

Where the testator gives legacies without directing who shall pay the same, or out of what fund they shall be paid, the personal estate being the primary fund for the payment of legacies, the legal presumption is, that he intended they should be paid out of his personal estate only, and if that is not sufficient the legacies fail.

Even where the testator uses introductory words, which would raise by implication a charge upon the real estate, that implication is rebutted where he disposes of his personal estate in the form of a residue after the gift of legacies.

APPEAL from and *supersedes* to a decree of the Circuit Court of the county of Taylor, rendered on the 10th day of September, 1878, in a cause in said court then pending, wherein John B. Read and others were plaintiffs, and Thomas Cather's administrator and others were defendants, allowed upon the petition of the plaintiffs.

N. Goff, Jr. and *Edwin Maxwell*, for appellants.

Martin & Woods, for appellee.

PATTON, J. Thomas Cather died 1865, leaving a will, which is as follows, to wit:

"I, Thomas Cather, of the county of Taylor, and State of West Virginia, do therefore make, ordain, publish and declare this to be my last will and testament—that is to say:

"*First.* After all my lawful debts are paid, the remainder or residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my wife, Barbara, her interest and support upon the home-farm. To my daughter, Emily Read, two thousand dollars, to be paid in four equal annual payments, the first payment fifteen months after my decease;

and to my grandson, Guy R. C. Read, one thousand dollars, to be paid in two equal annual payments, the first within one year after Emily's last payment is due. To my son, Flavius Josephus, all the land I own on the north side of a line (the R. Lowe land of twenty-two acres included) running from a white oak corner to lands of Moses Hustead, standing near to and south of the site of an old still-house, known as Francis Coplin's, running thence south eighty-seven (87) east sixty (60) poles to a white oak; thence north fifty (50) east thirty-six (36) poles to F. Coplin's corner; thence north with said Coplin's lines 2.25 or 30 a. To my son, Fabricius Augustus, all the residue of my lands in Taylor and Upshur counties. My personal property to be equally divided between my three children, Emily, Flavius J. and Fabricius Augustus, or their heirs, &c. I likewise make, constitute and appoint my son, Fabricius Augustus, to be executor of this my last will and testament, hereby revoking all former wills."

Emily Read and her husband, and Guy R. C. Read brought suit in the Circuit Court of Taylor county, against F. A. Cather, as executor and in his own right, and A. J. McDonald and James Burnside, Jr., who were purchasers from F. A. Cather of the land devised to him in said will, alleging an insufficiency of assets to pay the debts and legacies, and seeking to charge the real estate in the hands of the purchasers, McDonald and Burnside, with the payment of the legacies. The court below dismissed complainants' bill; and they have appealed to this court.

The only question, which arises upon the record, is, whether the lands devised to F. A. Cather in said will are charged with the payment of the legacies to Emily Read and Guy R. C. Read.

Whether a legacy is a charge upon the real estate devised in a will is a question of intention upon the part of the testator. According to the English rule that intention is to be derived exclusively from the provisions of the will; and parol evidence is inadmissible to aid in ascertaining that intention. 1 *Rop. Leg.* 451 (576, 4th ed.); *Parker v. Fearnley*, 2 Sim. and Stu. 592. In Virginia the rule is not so strict; and parol

evidence is admissible. *Downman v. Rust*, 6 Rand. 587; *Clark v. Buck*, 1 Leigh, 490; *Trent v. Trent's Ex'r*, Gilm. 174. Chancellor Kent thus states the law: That the real estate will not be charged with the payment of legacies, unless the intention of the testator to that effect is expressly declared, or clearly to be inferred from the language and disposition of the will; and that it was not sufficient, that debts or legacies are directed to be paid, that alone does not create the charge; but they must be directed to be first or previously paid, or the devise declared to be made after they are paid. *Lupton v. Lupton*, 2 Johns. Chy. 614.

Whether parol evidence is ordinarily admissible or not, in this case none is offered; and the intention of the testator is to be derived from the terms of the will itself. There is no express charge of the real estate with the payment of legacies, and the only question is: Does a charge upon the real estate arise by implication? What words are sufficient to create a charge by implication has been the subject of much discussion in the adjudicated cases. It has been held, that where the land is devised "after debts and legacies paid" and "I will and devise that all my debts, legacies and funeral expenses shall be paid and satisfied in the first place; Item, I give and devise," &c., are sufficient words to create a charge upon the realty (1 Rop. Leg. 672-3); also, where a testator gives the residue of his estate real and personal "not herein before disposed of," and "all the rest, residue and remainder of his real and personal estate," and "all the rest and residue of his goods and chattels and estate." 2 Lomax's Ex'ors, 167 (87).

The counsel for appellants have cited only three cases in support of the position, that by the will of Thomas Cather the land is charged by implication with the payment of the legacies, viz.: *Cole v. Turner*, 4 Russ. 376; *Morehouse v. Scaife*, 2 Myl. & Cr. 695, and *Downman v. Rust*, 6 Rand. 587. In the first of those cases, after a gift of legacies, the testator devised "all the rest, residue and remainder of his freehold, copyhold and leasehold estates;" in the second, the testator devised "all the rest and residue of his estate, both real and per-

sonal;" and in the third, the testator devised "all the rest of her estate real and personal in fee simple."

In the present case it is not pretended that there are any words indicative of an intention on the part of Thomas Cather to charge the real estate by implication, except the words: "To my son, Fabricius Augustus, all the residue of my lands in Taylor and Upshur counties." This is a specific devise of those lands to Fabricius Augustus. The testator had just before made a specific devise of lands to another son, which he particularly identifies by detailing how the line is to be run, and then gives the residue of his land in Taylor and Upshur counties to this devisee. It was not a devise of the residue of his estate real and personal, but only the residue of his land in those two counties, after a portion of it had been devised to another son. The fact, that the devisee was also the executor, is relied upon by counsel, as evidence of an intent to charge the real estate. Formerly it was held to be a material element in arriving at the intention, that the executor was also the devisee, and was directed to pay the legacies as executor, or to see the will performed; but it is now held, that where a testatrix directed her legacies to be paid by her executor, to whom she afterwards devised all her real estate, and the residue of her personal estate, after payment of debts and funeral expenses, that the legacies were not charged on the real estate. *Parker v. Fearnley*, 2 Sim. and Stu. 592. The vice-chancellor says: "I cannot infer, that the legacies were to be so charged, because she had directed her legacies should be paid by her executor, for by law pecuniary legacies are to be paid by him; nor because she has made her executor the residuary legatee of her personal estate after payment of her just debts and funeral expenses, without mentioning legacies, for pecuniary legacies are imposed by the law upon the residue of the personal estate after the payment of just debts and funeral expenses, and the omission of such direction in the will is immaterial, unless there be words in the will directly affecting the real estate."

Thomas Cather in his will does not direct who is to pay the legacies, nor out of what fund they are to be paid. In

Harris v. Fly, 7 Paige's Chy. 425, the chancellor says: "The personal estate is the primary fund for the payment of debts and legacies. If, therefore, a testator gives a legacy without specifying who shall pay it, or out of what fund it shall be paid, the legal presumption is, that he intended it should be paid out of his personal estate only; and if that is not sufficient, the legacy fails." But in this case there is a strong circumstance to show that the testator did not intend to charge his real estate. He first gives the legacies, then specifically devises the real estate and then says: "My personal property to be equally divided between my three children, Emily, Flavius J. and Fabricius Augustus, or their heirs, &c." From this provision it is apparent, that the testator contemplated, that after the payment of debts and legacies there would be a residue of personal property, which he gives to his three children, in which event it would have been unnecessary to charge the specified devise of the real estate with the pecuniary legacies. Even where a testator uses such terms in a part of his will, as would imply an intention on his part to charge the realty, as where he says, "as to my worldly estate, I dispose of the same after legacies paid," this implication is rebutted, where it appears by a disposition of personal estate in the form of a residue, that the testator anticipated a surplus of personal estate after the payment of legacies. The link of connection between the introductory words and the devise of the real estate (which existed in the cases where the charge was implied) is incomplete and broken, and the introductory expressions are quite consistent and satisfied by imputing to the testator the intention that he meant his legacies to be discharged out of his personal property, and that estate only. Consequently there is no foundation for a court of equity to raise a charge upon the real estate in aid of the personal fund by implication. In such case, the intention to charge the land implied from the introductory words is repelled by the contrary implication arising from the bequest of a personal residue, which the testator supposed would remain after satisfaction of the legacies. 2 P. Wms. 188; *Rightley v. Rightley*, 2 Ves. jr. 328; *Keeling v. Brown*, 5 Ves. jr. 358; *Chitty v. Chitty*, 3 Vesey, 545.

In the will of Thomas Cather there was no such introductory expressions, as would raise a charge upon the realty by implication; and hence the disposition of the personal estate after providing for legacies, makes a much stronger case to show there was no intention upon the part of the testator to charge the real estate.

I see nothing in the will of Thomas Cather to raise a charge by implication upon the real estate, for the payment of the legacies; and I am, therefore, of opinion to affirm the decree of the court below dismissing the bill of complainants, with costs to the appellee, James Burnside, Jr., and thirty dollars damages.

Decree affirmed.

See Hoyt v. Hoyt, *ante*, p. 818.

WILBOURN vs. SHELL.

[59 Mississippi, 205.]

**EFFECT OF ATTEMPTED RE-EXECUTION TO CORRECT SPELLING.—
PROOF OF DESTROYED WILL.**

If, in order to correct the spelling in his holographic will and make it more legible, the testator has it copied, and attempts to execute the copy, which proves defective from want of sufficient attestation, the original, although destroyed by him, should be admitted to probate.

The contents of the will may be proved by the copy after it is shown to be accurate; and the testator's attempted execution and his preservation of the copy is such evidence that the original, which was complete and not provisional, was his will, that, with his declaration to that effect, the testimony of the copyist, who is disinterested and credible, and corroborating circumstances, it will justify the probate.

APPEAL from the Chancery Court of Panola county.

Two sons of Elijah Wilbourn, the appellants, who were the

devises of all his land, petitioned for the probate of the holographic will mentioned in the opinion, and citations issued for the other heirs. The appellees answered, and, upon the evidence at the final hearing, the chancellor decreed that the instrument attested by J. F. Hobgood and another witness was the true will, and dismissed this petition.

L. C. Balch, and Taylor & Kyle, for the appellants.

Hall & Boothe, for the appellees.

COOPER, J. The questions upon the decision of which this cause must turn are three: First, Was the paper presented by Wilbourn to Hobgood, in the year 1877, for the purpose of having a copy thereof made, his holographic will? Second, Are the contents of said instrument sufficiently proved to entitle it to probate? Third, If this paper was the will of Wilbourn, and its contents have been sufficiently proved, was it subsequently destroyed by him, *animo revocandi* absolutely, or was it a case of conditional relative revocation? We shall be aided in a solution of the first question by considering first the inquiry secondly above noted; for, if it be true that the contents of the paper have been sufficiently proved, we are at liberty to consider its provisions, for the purpose of discovering the intentions of the testator in executing the instrument, and also in his subsequent execution of the second writing and his destruction of the first.

In determining this question we experience little difficulty, for the witness who testified as to the contents of the instrument is wholly disinterested, and not only had the best means of knowing the facts to which he testified, but is supported by the undisputed fact that the decedent attempted to execute as his will a paper which he at least considered as containing the identical provisions found in the first. The decedent brought to the witness Hobgood the original, for the purpose of getting him to make a legible and correctly spelled copy, and immediately attempted to execute the copy so made as his will, and as a copy of the original. This act of the de-

cedent, if not a declaration by him of the fact that the one paper was a copy of the other, is strongly corroborative of the testimony of the witness; for we cannot presume that a person intent on the execution of so important an instrument would, with both papers in his hands, neglect to inform himself of the correctness of the one which he expected should carry into effect his testamentary wishes as expressed in the other. It would, in most cases, be impossible to prove the contents of lost instruments, if the evidence in this case should be held insufficient. The identity of the copy is fixed beyond dispute; the circumstances under which it was written suggest that care was taken in its preparation; it was immediately acted upon by the person principally interested as a correct copy; and its accuracy is attested by the testimony of a wholly disinterested and intelligent witness. The evidence leaves in our minds no doubt that the original was written by the testator (as he declared to the witness it was), that it was subscribed by him, and that the copy made by the witness was a correct copy of the same.

Was this original paper the will of the said Wilbourn? That it was, we think is clearly shown by the facts that the paper was declared by the testator, in his conversation with the witness, to be his will; that it was in form a completed instrument, evidencing a determinate, definite purpose on the part of the maker, and not in form preliminary or provisional; that it was preserved by the writer from November, 1876, to some time in the autumn of 1877 (a care which would hardly be given to a mere memorandum of such simple provisions as are noted in it); and, finally, that it contained precisely the disposition of his estate which the testator attempted to make by his execution of the copy written by the witness Hobgood.

Was this will revoked by the testator? The legal presumption is, that a will which was in the possession of the testator, but which cannot be found after his death, was destroyed by him *animo revocandi*. 1 Redfield on Wills, 328; 1 Jarman on Wills, 270, and authorities cited in note 13. But the material inquiry in all cases is, whether the destruction of the will was *animo revocandi*, and to determine this it

is necessary to consider the circumstances under which and the purposes and reasons for which it was destroyed; and where from all the circumstances in evidence it appears that the destruction or revocation was connected with, or because of, the execution of another will, and that the testator meant the revocation of the one to depend upon the validity of the other, then if the latter will is inoperative, from defect of attestation or other cause, the revocation fails also, and the original will remains in force. *Hairston v. Hairston*, 30 Miss. 276; *James v. Shrimpton*, L. R. 1 P. D. 431; *Barksdale v. Barksdale*, 12 Leigh, 535; *Onions v. Tyrer*, 1 P. Wms. 343; 1 Jarman on Wills, 294.

From a consideration of all the facts in evidence, we are satisfied that the testator destroyed his holographic will, under the belief that the copy thereof executed by him was a valid will, and not with the intention of dying intestate as to his lands. It is inconceivable that one would preserve for a year an instrument as his will, and then procure a copy of it to be made, and execute the copy with the intention of making that his will, and then destroy the original and retain carefully the copy, for the purpose and with the intention of dying intestate. If the execution of the copy had been attested by three instead of two witnesses, it would have been a valid will. Being inefficient because of the want of attestation, a revocation of the prior will, made by the testator under a belief in its validity, is conditional and not absolute, and the condition having failed, the original is in law still the existing will of the testator, and is entitled to probate.

The decree is reversed and cause remanded, with instructions to the Chancery Court of Panola county to admit to probate the copy as proved.

Decree accordingly.

As to proof of lost or destroyed wills, *Foster's Appeal*, 1 Am. Prob. R. 485. Effect of partial re-execution of will, *Frear v. Williams*, Id. 85.

ESTATE OF JOHNSON.

[57 California, 529.]

WILL BY ONE JUDICIALLY DECLARED OF UNSOUND MIND—PUBLICATION OF WILL—EFFECT OF DRUNKENNESS.

The fact that at the execution of his will testator was under guardianship, and had previously been declared to be of unsound mind, are only *prima facie* evidence of lack of testamentary capacity.

Where, after the will had been signed by the testator and the witness at his request and in his presence, the scrivener asked deceased if the paper was his will, and he replied affirmatively. *Held*, there was a sufficient declaration that the instrument was his will.

No legal presumption of unsoundness of mind arises from proof of inebriety—it is a fact to be considered by the jury.

The opinion contains the facts.

Fox & Kellogg, for appellant.

Fox & Ross, for respondent.

MYRIOK, J. This is an appeal from an order of the court below admitting to probate the will of the deceased, and from the order denying motion for new trial.

The question as to the soundness or unsoundness of mind of the deceased was a question of fact upon which there was a conflict of evidence. There was *some* evidence that, at the time of the execution of the proposed will, he was of sound and disposing mind, notwithstanding other evidence tending to show that for twenty years he had been addicted to the excessive use of intoxicating liquors, and had been for years, as one witness stated, "a noted drunkard." Upon that evidence the court below found that he was of sound and disposing mind, and there being a substantial conflict in the evidence, it is not our province to disturb the finding. We cannot say, as a rule of law, that because a man is a drunkard, therefore he is of unsound mind. It is a question of fact for the jury or court below to determine, whether the inebriety has had the effect of

rendering his mind unsound, either permanently or temporarily, covering the time of the execution of the alleged will.

At the time of the execution of the proposed will, December 17th, 1877, the deceased was under guardianship as an incompetent person, under §§ 1763 and following, Code of Civil Procedure. It is claimed by the appellant, who contested the probate of the will in the court below, that the action of the Probate Court in adjudging him to be a fit subject for guardianship, had the effect in law of conclusively determining that he was, during the guardianship, incompetent to make a will. Section 40 of the Civil Code, as then in force, read as follows :

“ After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined.”

This section was amended in 1878, but the amendment does not apply to this case. We are of opinion that, under the above section as it read in 1877, the adjudication of incompetency was, as to lack of testamentary capacity, *prima facie* evidence only, and that the court below was correct in hearing evidence as to whether the ward was, at the time of the execution of the proposed will, actually restored to capacity.

There is some indefiniteness as to the witnessing of the will ; viz., as to whether the witness Wilcox was informed, *before* he wrote his name as a witness, that he was witnessing a will. The other witness knew from the deceased that the paper was being executed as a will, and he was of opinion that Wilcox was possessed of the same knowledge. Wilcox, however, states, in substance, that deceased came to his place of business and asked him to go and witness his signature ; that they went together to the office of the scrivener, where the paper had been prepared, and the deceased signed the paper, and asked the witnesses to witness it, and they signed as witnesses ; that thereupon the scrivener asked deceased if the paper was his will, and he replied, “ Yes ” ; that the whole time

occupied in the transaction at the office of the scrivener did not exceed five minutes. We are asked to hold that this state of facts does not show a proper execution of the will, in that the witness Wilcox did not understand, at the moment he wrote his name, that he was witnessing the execution of the paper as and for a will. We are of opinion that the whole interview, as had between the deceased, the witnesses, and the scrivener, was one transaction; and that, as a part of that transaction, the deceased did declare to the witnesses that the paper was his will. Before the parties separated, and while the paper was there before them, and was under consideration—indeed, before any act had taken place, after the signing—the declaration was made. We think this was a substantial compliance with the statute. (*Vaughan v. Burford*, 3 Bradf. 78; *Jackson v. Jackson*, 39 N. Y., 153.)

Judgment and order affirmed.

MORRISON, C. J., and SHARPSTEIN, J., concurred.

Wills executed by drunkards.—Habitual drunkenness does not of itself, as a rule of law, render one incapable of making a valid will. There is in such a case, no presumption of incapacity. *Gardner v. Gardner*, 23 Wend. 526; *Lewis v. Jones*, 50 Barb. 645; *Ex-parte Patterson*, 4 How. Pr. 34; *Thompson v. Kyner*, 65 Penn. St. 368, and many cases there collected; *Leckey v. Cunningham*, 56 Penn. St. 370; *Whitenack v. Stryker*, 1 Gr. Ch. (N. J.) 8; *Pierce v. Pierce*, 38 Mich. 412. When the will was made *under the influence of liquor* it is not necessarily void. It must be shown affirmatively, in order to set aside the will, on that ground, that the testator's judgment or mental power was vitiated by the intoxication. *Peck v. Cary*, 27 N. Y. 9; *Brown v. Torrey*, 24 Barb. 588; *Waters v. Cullen*, 2 Bradf. 354; *Julke v. Adam*, 1 Redf. 454; *Pierce v. Pierce*, 38 Mich. 412; *Turner v. Cheeseman*, 2 McCart. 248; *Key v. Holloway*, 7 J. Baxter, 575; s. c. 1 Am. Prob. R. 300.

The test to determine whether the drunkenness of testator was of such a character as to incapacitate him from testamentary acts is variously stated.

In *Peck v. Cary*, *supra*, it is said, "in order to vitiate the act the testator must at the time of executing the paper have been under the influence of intoxicating liquor, and to such a degree as to disorder his faculties and prevent his judgment."

In *Pierce v. Pierce*, *supra*, it is said that the intoxication must exist "to such an extent as to deprive a testator of the power of controlling his conduct and knowing what he is about."

It may be shown—as evidence of undue influence—that the testator was

intoxicated when the will was executed. *Re Cunningham*, 52 Cal. 465. *Duffield v. Morris' Executor*, 2 Harr. (Del.) 375, is a leading case, and it is there held that testamentary capacity may be *temporarily* destroyed by drunkenness, and that drunkenness long continued may *permanently* destroy it. See, also, to the same effect, *Nussear v. Arnold*, 18 Serg. & R. 323; *Ray's Med. Jur. "Insanity"* (5th ed.), §§ 543, 544.

It has been frequently held that a greater degree of capacity is in general required to make a contract than to make a will. *Butler v. Mulvihill*, 1 Bligh, 187; *Warnock v. Campbell*, 10 C. E. Gr. (N. J.) 485; *Ritter's Appeal*, 59 Penn. St. 9.

In *Lewis v. Jones*, 50 Barb. 645, the court made an elaborate examination of the question and discussed the cases of *Matter of Burr*, 2 Barb. Ch. 208, and *Matter of Patterson*, 4 How. Pr. 84, holding that they were not authorities for the proposition that a will made by one under a commission as a habitual drunkard was void, and laying down as the true rule that the existence of the commission was only *prima facie* evidence of incapacity and may be rebutted by proof.

A similar rule prevails in Massachusetts. *Damon v. Stone*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. 115.

STUART vs. STUART.

[18 West Virginia, 675.]

MEANING OF THE WORDS "HEIRS" AND "FAMILY."

The word heirs in a devise to the heirs of a living person to take effect immediately, is to be interpreted as a *designatio personum*, and referring to the heirs apparent.

This rule is inapplicable to a devise of a future estate and there the word heirs has its strict legal meaning.

The word family as a designation of beneficiaries in a will, excludes parents, and is generally confined to children.

A devise of real estate to trustees for the use of testatrix son's wife and his family, and when he ceases to have a family, to his heirs forever, requires the application of the income to the support of the wife and children as a family, excluding children not residing at the father's home, and ceasing when the wife dies, when all the daughters have married or attained twenty-one and when all the sons have attained that age; as the family then ceases to exist.

APPEAL from and *supersedes* to two decrees of the court of the county of Greenbrier.

Bill to obtain construction of the second clause in the will of Elizabeth Stuart, which read as follows:

"I will to Henry Stuart and Thomas Bradford in trust for my son Robinson Stuart's wife and his family, the tract of land on which my said son now resides. Also, the tract of land called the Henning place, and when Robinson ceases to have a family, to his heirs forever—one third of my Raleigh lands, and the land on the Nicholas road to be held in trust by the said trustees for the same purpose and in the same way. Also the stock, farming utensils, household furniture, &c., to go with the lands—I mean such stock, &c., as may be there at my death. My slaves—Laura to be held and go in the same way, if my son John claims Maria, who belongs to him, but if he does not claim Maria, she is to go in that way, and John is to have Louisa; and Leroy, George and Andy to be held and go in trust in the same way as the land and other property, with all the increase."

By the fourth clause of this will two slaves are given to Augusta, the daughter of William R. Stuart, Sr., called in the will Robinson Stuart, and another slave is given to his daughter, Elizabeth Jane, and all his other property, real and personal, except that named in this second clause, is given to the testatrix's son, John Stuart, and her daughter, Elizabeth Reid, and her husband, William B. Reid. The surrounding circumstances regarded by the parties as of importance in the interpretation of this second clause in the will are, that the will was executed March 15, 1859, and the testatrix died very shortly thereafter, her will being proven July, 1859. The place on which her son, William R. Stuart, Sr., lived, referred to in this second clause of the will, was worth about \$28,000, the Henning place from \$1,000 to \$1,200, and the Nicholas lands was worth about \$1,400. The annual value of these lands was about \$1,200. When the will was written, and the testatrix died, her son, William R. Stuart, Sr., had two daughters and five sons, the oldest of whom was over twenty-one years old, and the youngest was some four years old. He had no other children; and his wife, the mother of these children died some five years afterwards, in 1864. They all continued to

live together till after her death on this homestead. In 1866, one of the daughters married and has never since lived at home. The other daughter married in 1870 and then finally left the homestead. The sons at different times having grown up left their home permanently, so that when this suit was instituted, there were residing at the homestead only Augustus B. Stuart, aged some thirty-three years, and the youngest son, Thomas F. Stuart, aged about nineteen years and six months, who was then at school, temporarily absent from home. Augustus B. Stuart had married, and his wife and child and her father, the defendant S. B. Williams, were also living at the homestead, and also his father, William R. Stuart, Sr. The agreement which William R. Stuart signed, when S. B. Williams came there to live, November 15, 1873, stipulated that Stuart should furnish the corn used for bread in the family, a certain quantity of pork and the milk used, the garden and the furniture; and he required Williams to furnish the groceries and other things. He required Williams to furnish board for Augustus B. Stuart, his son, who was the son-in-law of Williams, and also to furnish board for any other member of his, William B. Stuart's family, as well as board for himself, and it was to be distinctly understood, that William R. Stuart, Sr., was to have control and be the head of the family.

Dennis & Dennis, for appellant.

John W. English, for appellees.

GREEN, J. The only question in controversy in this cause is the true interpretation of the second clause of the will of Elizabeth Stuart. The difficulty in understanding this clause is the use of the words "heirs" and "his family," meaning the family of William R. Stuart, Sr., by which in part are designated the beneficiaries under this second clause of this will, and the words used to designate, when these beneficiaries, whoever they may be, shall have the full enjoyment of the property named in this second clause, the time being designated as, "when Robinson (meaning William R. Stuart, Sr.) ceases to

have a family," at which time it is to go, says the will, "to his heirs forever."

The word "family" has a great variety of meanings depending on the instrument in which it is used. If it be in an act of the legislature, its meaning varies with the varying purposes of the act in which it is used. If it be in a contract, its meaning largely depends on the character of the contract. If in a will, it depends not only upon the context and purposes, for which it is used in the will, but, in England, also upon the nature of the property bequeathed or devised. So variant is the meaning of this word family, that in the same will the identical same words will be construed as having essentially different meanings.

In its broadest and most comprehensive sense a family is "a household including parents, children, servants and, as the case may be, lodgers and boarders; the collective body of persons who live in one house and under one head or management." This comprehensive meaning was given to this word in the case of the *Chicago & Northwestern Railway Co. v. Chisholm*, 79 Ill. 587, where a ticket had been issued by the company "for the exclusive use of a certain man and his family." In this case it was held, that a son of such person, who resided with his father, though he was over twenty-one years of age, had a right to ride on the railroad cars on such a ticket issued to the father. The same comprehensive meaning was given the word family, when used in a statute in Illinois, which gave the widow such beds, bedsteads, bedding and household and kitchen furniture as may be necessary for herself and family, and provisions for a year for herself and family. The court in *Strawn et al. v. Strawn*, 53 Ill. 274, in speaking of this statute say: "We are of opinion the legislature intended by the word family to include such persons as constituted the family of the deceased at the time of his death, whether servants or children, who had attained their majority. In this of course we do not include boarders, but only the persons constituting the private household of the deceased."

But a less comprehensive meaning was given to the word "family" as used in a similar Missouri statute. The court in

speaking of this statute says, in *Whaley v. Whaley et al.*, 50 Mo. 581, 582: "Family, as here contemplated, means children or those persons who have a legal and moral right to expect to be fed and clothed by another, but those persons, who have neither a legal nor moral claim to the bounty of another, cannot be placed in that category." The court accordingly held, that within the meaning of this statute, which gave the widow the provisions "necessary for the subsistence of her family for twelve months," were not to be included provisions for servants. They say in its limited sense the word family means "the father, mother and children."

In *Wilson v. Cochran*, 31 Tex. 677, the most sweeping and comprehensive meaning was given to the word family in the Constitution of Texas, which protects from forced sales the homestead of a family. Speaking of this provision of their Constitution the court say, page 680: "The word family was most certainly used in its generic sense, embracing a household composed of parents and children or other relatives, or domestics and servants; in short every collective body of persons living together within the curtilage, subsisting in common, directing their attention to a common object, the promotion of their mutual interest and social happiness. * * * And if the property, on which they are domiciled, belongs to either or to all so living together, it equally comes within the purview of the constitutional guaranty, and in fact is a homestead, and cannot be subjected to a forced sale."

A much more restricted meaning is given to the word family as used in the Constitution of Virginia giving a homestead to the head of a family. In defining the meaning of this word as so used, the court, in *Calhoun v. Williams*, 32 Gratt. 22, say: "The family may consist of a wife and children or of other persons, who may stand in a state of dependence in the family relation; or it may consist of persons standing in either of these relations to the head of the family, whether the father or mother or a brother or sister or other relation is the head; but they must be persons, who are dependent in some measure on the head for support, and who have an interest in his holding his property, and would be prejudiced by its

seizure and sale under execution or other process, and who would be benefited by its exemption." Again they say, page 24: "There are cases which hold that, to constitute a family within the meaning of such statutes, there must be a condition of *dependence* and not a mere aggregation of individuals;" and, therefore, "a single man, who has no other person living with him than servants and employees, is not the head of a family within the meaning of statutes creating homestead exemptions." This was the decision of the court in that case.

Thus the comprehensive meaning of the word "family" as given by the lexicographers: "The collective body of persons who live in one house and under one head or manager," has been variously modified by the courts to suit the general views of those by whom the word is used; and it is rarely interpreted to have as comprehensive a meaning as the definition given by the lexicographers. But there is another and quite distinct meaning given by all lexicographers to this word "family," a meaning which is often in common parlance attached to this word. That meaning is: "Those who descend from one common progenitor—a tribe or race." This second meaning qualified to suit the particular occasion of its use, as the first meaning was, is the one attached to this word "family" almost always by the courts, when it is used in a will to designate the beneficiaries in a will. When this second meaning is given to the word, it is of course utterly unimportant, whether the parties designated by the word "family" "live in one house" or not, or whether they are "under one head or manager" or not. Often those who live in one house, or under one head or manager, are held not to be included in the meaning of the word "family." What is required is, that "they descend from one common progenitor." Thus it is universally held by the courts, that if a legacy be given to "A.'s family," A. having children, the father, A., is not included in the word family and is entitled to no part of the legacy. Nor is the wife of A. ever held to be included in this word family in such case; but the word is in such case, when not controlled by other expressions in the will, always interpreted to mean A.'s children to the exclusion of both A. and

his wife. See *Barnes v. Patch*, 8 Ves. 604-607; *McLeorath v. Bacon*, 5 Ves. 166; *Woods v. Woods*, 1 Myl. & Cr. 401; *White v. Briggs*, 23 Eng. Chy. R. 583; *Wood v. Wood*, 25 Eng. Chy. R. 64; *Parkinson's Trust*, 40 Eng. Chy. R. 242; *Gregory v. Smith*, 41 Eng. Chy. 708.

These cases show conclusively, that if by a will a bequest be made to A.'s wife and his family, and there be no words in the will to control or modify their meaning, the wife and children would be entitled to the legacy as joint tenants. In England if lands be devised to "A.'s family," and he has several children, the land under such a will passes to the eldest son of A. or to his heir. See *Chapman's Case*, Dy. 333; *Camden v. Clarke*, Hub. 33; *Wright v. Atkyns*, Coop. 122; *Doe v. Smith*, 5 M. & S. 126. But, as the cases show, this construction is placed on a devise because of the right of primogeniture in England; and it is obvious, that here the construction of the word "family" would be the same in a devise as in a bequest. There have been cases in England where, under peculiar circumstances and provisions in a will, the courts have set aside a bequest because of the vagueness and uncertainty of the meaning of the word "family" in its connection with other words used. See *Doe v. Fleming*, 2 Crompt., M. & R. 638; *Robinson v. Waddelow*, 8 Sim. 134.

But the authority of these and like cases has been questioned; and the cases we have cited and many more show, that in a will worded as the one which we are construing, the word "family" has a certain meaning; and it would not be held, that the devise or bequest was void for uncertainty. See *Hill's Ex'rs v. Bowman*, 7 Leigh, 650, and *Whelan et al. v. Reiley*, 5 W. Va. 356. This court in the last case decided that the expression "family" in a will is held *prima facie* to mean children and must be so construed, unless some reason appears in the context of the will for extending or altering it. If, therefore, there had been no interposition of trustees in this will, and nothing else in the will indicating a qualification of its meaning, the devise and bequest in the beginning of the second clause to Wm. R. Stuart's wife and his family, must have been interpreted as a devise and bequest to his wife and children living at the death of the testatrix, as joint tenants, as the

authorities we have cited abundantly show. The devise and bequest was to take effect immediately, and therefore, of course, those who answered the description of the beneficiaries under the language used at the death of the testatrix, when the will took effect, and those only, would be regarded as the beneficiaries meant by the will.

It remains to inquire, how far this meaning of the words used by the testatrix is modified by this property being willed to trustees for the use of those beneficiaries, and by the subsequent provision, that "when Robinson ceases to have a family," it was to go to his heirs forever. This language, considered in connection with the fact that the property was devised and bequeathed to trustees, till the family ceased to exist, shows that the family itself, as a family or unit, was intended to have the use of this property till it ceased to exist as a family; and that during the continuance of the family as the family of Robinson, the father, the property was not to belong to the wife and children as joint tenants, and liable to be divided among them. The difference thus produced is, that the children, who after they were educated and obtained their majority and ceased permanently to be members of the household, so long as the family continued to exist, would have no right to have the property divided, nor would they have any claim to any part of the rents and profits of the property during the continued existence of the family as such. The rents and profits were intended to be appropriated to the education and support of the members of the family who remained at home, to the exclusion of married daughters who had left home, or sons who had obtained their majority and left their original home.

The apparent object of the testatrix, in the modification, was to put all the children of W. R. Stuart, her son, on an equality, by allowing the rents and profits of the property, about \$1,200 a year, to be applied to the support and education of the younger children while children, instead of allowing it to be appropriated by elder children, who had already received their education, attained their majority, or been married, if females, and set up for themselves. The idea that the rents

and profits of the land were to be appropriated for the support and maintenance of the family, till William R. Stuart ceased to have a family, was always acted upon by all the parties in trust; and it is not now controverted by the counsel of any of them; and I think that it is a construction which may be deduced fairly from that clause of the will, though the idea is certainly badly expressed.

The word "family" in the phrase "when Robinson ceases to have a family" obviously does not mean, as it did in the beginning of this clause of the will, children. Its meaning is not here the second meaning of this word: "those who descend from a common progenitor," without reference to their residence; but its meaning is a qualification of the first meaning of this word: "a collective body of persons who live in one house and under one head or manager." When this word "family" derives its meaning from this definition of it, the authorities we have cited show that its meaning varies considerably. Thus, in some cases it includes servants resident in the house or connected with the household; and it may be in some cases it might include even boarders, as doubtless its comprehensive meaning would. But boarders are generally not included in this word "family"; and we have seen in some instances servants also are excluded from it. Children are often included in this meaning of the word family, when resident at home, though they have attained their majority. But in other cases children, who have attained the age of twenty-one, would not be included in this word family, and it would be confined in its meaning to persons whom the head of the family was under a legal obligation independent of contract to support. This was the interpretation of the word in *Calhoun v. Williams*, 32 Gratt. 18. This interpretation would include in the word family the wife and infant children, that is, children under twenty-one years of age, but would exclude from it children who had attained their majority, though they might continue to reside with the father; and so, too, it would exclude a daughter under twenty-one years of age, who had married and continued to live at her father's house, as he would

be under no obligation to support her, such obligation by her marriage being transferred to her husband.

Looking to the obvious purpose which the testatrix had in impliedly directing the rents and profits of the property to be applied to the support of Wm. R. Stuart's family as such, we must conclude that she meant thereby only his wife and children. They only, as the will shows, were intended to be the beneficiaries under her will. It excluded Wm. R. Stuart or any son-in-law. It is true Wm. R. Stuart, as the head of the family, would necessarily receive an indirect benefit from the trustees applying the rents and profits of the property to the support of his wife and children, as he would be thereby relieved from his legal obligation to support them; but it is obvious that he was not intended to have any benefit under this will, directly or in any way except by the indirect and unavoidable relief he would get from supporting his wife and infant children, which would necessarily result from the testatrix aiding in their support, and which, it is obvious, she intended to do by her will.

When then did William R. Stuart cease to have a family, within the meaning of this will? Obviously when his wife died, his daughters all married, and his youngest son attained the age of twenty-one; that is, on the facts shown in this cause on August 26, 1877. After that no one who might be living with him, whether married daughter or adult son, was dependent upon him, and to permit the proceeds of all this property, designed obviously for the use of his wife and his children, some \$1,200 a year, to be used in the support of a family composed, it might be, in no part of his wife or children, the sole beneficiaries, merely because in some sense he had not ceased to have a family, would clearly be wrong. He had ceased to have a family within the true meaning of this word, as used in this will; and it would, it seems to me, be equally a violation of the evident intention of the testatrix, to permit all the profits of this property, \$1,200 a year, to be thus indefinitely applied to the support of the family of William R. Stuart, Sr., when it consisted only of himself and his youngest son, who was a full-grown man over twenty-one years of age. It

was the design of the testatrix to have the rents and profits of the property applied to the support of the family, that is, while the wife lived, and till every member of the family, that is, every child, was reared and educated, till the youngest of them was twenty-one years old. If the family could be construed as not then ceasing to exist, it might be continued indefinitely by the youngest son continuing to reside at home; and thus he and his father could appropriate indefinitely all the proceeds of the property to the entire exclusion of all the other children, after every reason why he should enjoy the benefit of such proceeds, beyond his brothers and sisters, had ceased.

The same objections lie to holding that the family could be continued in existence by a married daughter and her husband continuing to reside with the father, whether the father was the head of the family or not. It is a new and different family from that contemplated by the will. The family contemplated by the will was one composed in whole or in part of the wife, unmarried daughters, and infant sons or daughters; and whenever William R. Stuart's family ceased to be composed in any part of any of these persons, he ceased to have a family within the true meaning of this language as used in the will. By the words, therefore, "when Robinson ceases to have a family, to his heirs forever," is meant, when his wife dies, and when his daughters marry, and when his youngest son attains the age of twenty-one. After that he ceased to have the family contemplated by this will.

But what is meant by the provision of the will, that this property is then to go "to his heirs"? It is contended that this means "to his heirs apparent;" that is, to his then children. But after a careful consideration of the question and of the whole will, I am forced to give to the words "his heirs forever" the usual technical meaning of such words. And to conclude, that the meaning of the testatrix is, that on his death the property shall go to such persons, and in such proportions, as real estate owned by him would descend to such persons, as, at the death of William R. Stuart, Sr., answer the description of his heirs. The word heirs is a word of well known legal

signification, and when used in a will it ought to be given this strict legal meaning, unless from the context it clearly appears that it was used by the testator in a different sense. An instance, where the courts have given to the word heirs another meaning than its strict technical and well-known meaning, is where a testator by his will makes a *present* and *immediate* devise to the heirs of a person known to be living; or where the devise is to heirs said in the will to be living. In such case it is apparent, that the word heirs, must mean heirs apparent or children, and that, without violating the clear intention of the testator, it cannot be construed as used in its ordinary legal signification. See *James v. Richardson*, 1 Vent. 534; 7 Jones, 97; 3 Neb. 832; Pol. 457; 2 Lev. 232; Raym. 330; 1 Eq. Cas. Abr. 214; *Burchet v. Dordant*, 2 Vent. 311; 1 P. Wms. 233; 5 B. & C. 148 (11 E. C. L. 145); *Goodright v. White*, Black. W. 1010; *Campbell v. Rawdon*, 18 N. Y. 416; *Conklin v. Conklin*, 3 Sanf. Chy. 70.

But this rule established by these authorities, whereby the word heir, when used in respect to a living person, means heir apparent, is inapplicable to the devise of a *future* estate. In such case the word heir has its strict legal meaning, unless a different intention appears clearly from the context. See *Campbell v. Rawdon*, 18 N. Y. 412; *Criswell's Appeal*, 5 Wright (41 Pa.), 288; *Richardson, &c. v. Wheatland*, 7 Metc. 169; *Milhollen's Adm'r v. Rice et al.*, 13 W. Va. 566; *Reid et al. v. Stuart*, and *Ellett & Co. v. Reid et al.*, 13 W. Va. 338. In the last named case this court reviewed all the above and other authorities, and reached these conclusions. It was a case in which was involved the construction of the word heirs, used by the same testatrix in the codicil to this same will now before us for construction. After careful consideration, we were compelled in that case to conclude, that the word heirs, as used in the codicil of this will, meant heirs in its usual and legal signification; and for the reasons set forth in the opinion of the court, in that case, we are compelled to interpret this word heirs, as having its usual and legal signification, also in this second clause of this will. I cannot perceive that such a construction violates any clear intention of the testatrix. I

can see nothing in the will that requires of us to say, that on the death of her son Robinson the testatrix meant that all the property she had given should go to the children of his then wife, in exclusion of his children by any other wife, if he should again marry. All such children would be equally related to the testatrix and to her son; and there is nothing in the will which shows clearly that she meant to exclude them. It is true that the children of his first wife were the special objects of her bounty; but this does not negative the view that she might well desire to make some provision for children by a second wife. This she has done by saying, that on her son's death this property is to pass to his heirs, words which would include those children by a second marriage, and which we must give effect to according to their natural meaning.

Another question suggests itself: As the wife of William R. Stuart, Sr., had an equal interest in this property with her children severally, has not he as tenant by curtesy an interest in this real estate? I am of opinion that he has not. One of the requisites to make a tenant by curtesy is, that the wife should have been seized in fact of the land; a seizure in law would not suffice. Now, the legal title to this land on the death of the testatrix passed immediately by the will to the trustees; and, as we interpret the will, it was their duty to apply the proceeds of the land, the rents and profits, to the support of the family as a unit. William R. Stuart was never entitled to receive any portion of these rents and profits, and never did, we suppose, receive any of them during the life of his wife. He certainly had no right to receive any portion of them. Neither he nor she had, therefore, during the marriage, any actual seizure of this land; and, therefore, he is entitled to no curtesy in it. On the death of his wife it descended to her heirs, who were her children.

The conclusion, therefore, that we reach is, that by the true construction of the second clause of the will of Elizabeth Stuart, the real estate named in said clause of this will was devised to Henry Stuart and Thomas Bradford, in trust for the wife and children of William R. Stuart, Sr., who were living at the death of the testatrix, to be held by them as joint ten-

ants, but subject to this provision, that the rents, issues and profits of the property were to be applied by the trustees, or with the assent of the trustees, to the support of such of them as continued members of the family, by residence with their father; such application to be made of the rents and profits during the lifetime of the wife, and till the youngest child arrived at the age of twenty-one, and no longer; that thereafter, being freed from this special charge, it became the property of the children of William R. Stuart, Sr., as joint tenants, they having inherited the portion of it which belonged to their mother; that these children will remain such joint tenants, unless they choose to sever their tenancy by a division of this property, till the death of their father, William R. Stuart, Sr., when the estate of these children in said property will terminate, and in lieu of it will arise a *springing* devise in favor of all persons who would be heirs of William R. Stuart at his death, including these children, and if any of them be dead, their descendents, but including also any other children of William R. Stuart, Sr., whom he may have living at his death. Therefore, any division now made of these lands among the children of William R. Stuart, Sr., will be subject to be revoked and rendered a nullity by his having other children born hereafter, and living at his death. And while the parties entitled have elected to make a division of said real estate among themselves, which was directed to be done by the decree of January 26, 1879, yet as this election was made when the court had held that they had in the land an indefeasible estate of fee simple, and they may not choose to have such division when it is liable on a certain event, should it happen, to be set aside, it is proper for this reason to set aside said decree of January 26, 1879.

The decrees of the Circuit Court were based on an interpretation of this second clause of this will, which accords substantially with the opinion above expressed, except that it holds, that on the death of William R. Stuart, Sr., any children he might hereafter have, and who might be living at his death, would have no interest in this property. This construction of the will is in this respect, I think, erroneous; and I am there-

fore of opinion, that the decrees of the Circuit Court of November 15, 1876, and of May 26, 1879, should be reversed and annulled, and that the appellant should recover of the appellees his costs in this court expended, and that this court should render a decree construing said will in the manner above indicated, and remand the cause to the Circuit Court to be further proceeded with pursuant to the principles laid down in this opinion and, further, according to the principles governing courts of equity.

The other judges concurred.

Decrees reversed, cause remanded.

FOSSELMAN *vs.* ELDER.

- [1 Penn. Sup. Ct. 77.]

ADDRESS ON ENVELOPE READ WITH LETTER GIVING NOTE.

Testatrix made a bequest to one Isabella Fosselman, and left an envelope addressed "Dear Bella, this is for you to open," containing a note for \$2,000 and a letter over her signature reading "My wish is for you to draw this \$2,000 for your own use should I be called off sudden." *Held*, that the letter and inscription on the envelope constituted a valid testamentary disposition of the note operating as a codicil to testatrix will.

ERROR to the Court of Common Pleas of Mifflin county.

Issues amicably framed between Isabella Fosselman and G. W. Elder, executor of Elizabeth Fosselman.

The facts sufficiently appear in the opinion.

A. Reed, for plaintiff.

A. B. Wanner and *Frank R. Schell*, for defendant in error.

physically united ; it is sufficient, if they are connected by their internal sense, or by a coherence and adaptation of parts. *Wikoff's Appeal*, 3 Harris, 281. It was held, in *Guider v. Farnum*, 10 Barr, 98, that where a will is written on several sheets of paper, fastened together by a string, proof by two witnesses of the signature of the testator at the end thereof is sufficient ; and that the question whether there has been a subsequent fraudulent addition to, or alteration of, the instrument is for the jury, as in other cases. In the *Goods of Wedge*, 2 Notes of Cases, a portion of a letter was admitted to probate as the will of Jane Wedge, who on the third page of the letter wrote, and in the presence of two witnesses, as required by the English statute, subscribed her name to the following, viz. :

"When I dey I would like you to bury and take all I got for your treatment to me and by somethin for your little girl." The subscribing witnesses testified that after the paper was signed and attested, the deceased folded up the letter, and in their presence wrote the superscription it bore. In holding that the paper was clearly entitled to probate, the court said : "The letter is addressed to Mrs. Henry Host, and by 'you' the testatrix could mean no other person to be legatee than the person she addressed. I am of opinion, therefore, that the person is executor according to the tenor, and that probate should pass to him." That case is cited with approval in *The Goods of Taylor*, 4 Notes of Cases, 290, in which Mrs. Taylor made her will in the form of a letter, addressed on the outside to Sir George Simpson, and, after bequeathing her personal effects to her daughter, added the following : "I hereby appoint you my executor to carry this, my will, into effect." Administration with the paper annexed was claimed by the daughter on the ground that no executor was designated in the will ; but the address on the letter was admitted to show that by "you" the testatrix meant Sir George Simpson, the person to whom the letter was addressed, and probate was accordingly decreed to him as executor. In both these cases no envelope was used. The letters were in the form generally in use before the introduction of envelopes, but that fact cannot affect the principle. A separate paper inclosed and sealed up in an envelope is just

as much a part of the letter as if the name of the person to whom it is addressed was indorsed on the paper itself. There is no room in either case to doubt that the writing inside is addressed to the person whose name is written outside, and so far as security against fraudulent alteration or substitution of one paper for another is concerned, the one is just as safe as the other before the seal is broken. Either of them is more secure than separate papers attached merely by a string, as in *Guider v. Farnum, supra*.

It is also urged as an objection to considering the address on the envelope as a part of the testamentary paper, the former was written after the other was signed, and, therefore, the latter should not be considered as having been signed at the end thereof, as the statute requires; but the objection is without merit. It assumes what may or may not have been the fact. It is not an uncommon thing for persons to indorse the address before writing the letter, but if it were shown affirmatively that the address on the envelope was written last in order of time, it would be unimportant. The natural order of reading ought to control, and that is the name of the party addressed first, and then what is written to or concerning him. If the signature of the writer is appended to what is written, it fully meets the requirements of the statute.

Without pursuing the subject further, we are of opinion that the inscription on the envelope should be read as the preface to, and in connection with, the paper inclosed therein, and that they together constitute a valid testamentary disposition of the accompanying note, operating as a codicil to the will of the testatrix.

Judgment reversed, and judgment is now entered in favor of the plaintiff on the question of law reserved.

See *Newton v. Seaman's Friend Society, ante*, page 18, and cases in note.

MOULTON vs. HOLMES.

[57 California, 387.]

**POWER OF EXECUTOR OR ADMINISTRATOR TO COMPROMISE CLAIM.
—EFFECT OF STATUTE.**

Executors and administrators have the legal right to compromise debts due the estate.

A statutory provision that, under certain circumstances, an executor or administrator, "with the approbation of the Probate Court," may compound or compromise claims, is not restrictive of common law powers, it enables the representative to act with perfect safety and without being subjected to expense in sustaining his acts.

THE facts appear in the opinion.

Stetson and Houghton, for appellants.

Jarboe and Harrison, for respondents.

McKEE, J. This was an action brought by the plaintiffs, as executors of the estate of B. F. Moulton, deceased, to set aside a settlement of accounts between the defendants Holmes and Moore, and a release executed in consideration thereof, and to compel an accounting of the dealings and transactions of Holmes in the management and sales of certain real estate held by him as the trustee of Moulton.

It was charged in the complaint that the settlement was not for the benefit of the estate; that it was made without the authority of the executors and the approval of the Probate Court, and under a mistake as to the insolvency of Holmes, which was caused by false and fraudulent representations made by the latter for the purpose of cheating and defrauding the estate out of the moneys which he had in his hands belonging to it, and of appropriating them to his own use.

Holmes, in his answer, denied the allegations of the complaint. Upon the issues made by the pleadings, the cause was referred to a referee to take and state an account of the transactions of Holmes as the trustee of Moulton. Upon the com-

ing in of the report, the court below made and filed its findings of facts, and gave judgment for the plaintiffs for the sum of \$57,545 66, with interest and costs. But afterwards, upon a motion made by the defendant Holmes for a new trial, upon the grounds that the evidence was insufficient to justify the findings of the court, and that the decision was against law, the court ordered a new trial, and from the order comes this appeal.

Presumptively, the order is correct; and it is incumbent upon the appellants to show that the court erred. They contend that it was error to grant a new trial, because the release, executed in consideration of the settlement between Holmes and Moore was voidable, if not void, for the reason that Moore had no authority from Moulton, or from the executors of his estate, to make the release, and it was never approved by the Probate Court.

The release itself was not so much the object of attack as the consideration for which it was given. Having been given in consideration of the settlement of accounts or transactions between Holmes and Moore, acting as the attorney of the executors, the object of the action was to impeach the settlement for fraud and want of authority.

The court found that there was no fraud in the settlement, and that it had not been made or approved by the Probate Court. But it did not find that it had been authorized by the executors, although it found probative facts from which that fact ought to have been deduced. For it found, in substance, that Moulton was, in his lifetime, the owner of 113 lots of land in the city and county of San Francisco, and on the 14th of August, 1868, he conveyed them, by a contract in writing, to Holmes, for the sum of \$90,000. Of this amount, \$43,526 were paid at the time of the transaction, leaving due and unpaid a balance of \$46,474, which, by the contract, Holmes agreed to pay as follows, namely: By buying in an outstanding title to some of the lots, "on such terms as he and Moulton might agree upon," and by putting them all in market and selling them from time to time as he could; and, after paying the unpaid purchase-money in that way, he agreed to divide

the net proceeds of the sales equally between himself and Moulton, after payment of the expenses, etc., attending the management and sales of the property. Several sales were made under the contract, and a portion of the moneys realized from them was paid to Moulton.

On the 20th of October, 1868, Moulton assigned the contract to the defendant Moore, to the extent of \$8,000, and authorized him, as his attorney, to collect from Holmes any money which might be coming to him from sales made by Holmes. Afterwards, on the 19th of October, 1869, he conveyed all his right, title, and interest in the land, by quit-claim deed, to Moore, with intent to make Moore his trustee; and soon after the making and delivery of this deed he died; the appellants became his executors, and Moore continued to act as attorney for the estate.

In *Stewart v. Nevins*, 50 Cal. 279, it was held, that this conveyance to Moore, and the contract entered into with Holmes, left the testator no interest except an interest in the moneys for which the lands were to be sold under the contract with Holmes; that the precise sum to which the testator would be entitled could only be ascertained upon accounting and settlement first had with Moore and Holmes; and that the surplus, should there be one, belongs to the estate of the testator, and the executors are entitled to an accounting concerning it.

To ascertain this sum, Holmes and Moore made the settlement which is now sought to be impeached. Result of the settlement was, that Holmes conveyed to Moore, in trust for the estate, forty-six lots, being all of the unsold portions of the land transferred to him by the testator. Moore executed and delivered to him a release, in which were acknowledged the execution and delivery of the conveyance, and that there had been received from Holmes, by Moulton in his lifetime and by Moore after his death, the sum of \$66,811 on account of the transactions and sales under the contract, and that, in consideration thereof, he, "as owner and assignee of the contract," canceled and annulled the contract, and released and discharged Holmes from all liability on account of it.

The court did not find that Holmes was in fact insolvent at

the time of the settlement, or that he represented himself to be so, or that the executors knew of, advised, and consented to it, and afterwards ratified it. On the contrary, it found that the executors did *not* consent to the settlement or ratify it, and that they did not authorize it, except on the condition that Moore should satisfy himself that Holmes was insolvent to the extent of \$60,000, and that Moore never did satisfy himself that Holmes was insolvent to that extent.

A careful examination of the record satisfies us that the findings upon these matters are not sustained by the evidence. The evidence concerning them is not conflicting; it runs all one way; and it proves beyond question that Moore learned from reliable authority that Holmes was insolvent, and he communicated his knowledge to the executors, and the executors agreed with him upon the subject of Holmes' insolvency, and that it was best that a settlement should be made with him. They accordingly advised Moore to settle with him "upon the best terms he could get." At their solicitation, Moore made the settlement, and informed them of all that had been done. "They did not disapprove of it," but received the property which had been conveyed by Holmes in trust for the estate. When they received it, they knew that both Holmes and Moore had mortgaged it before the settlement; and knowing that fact, they, by an agreement in writing, assumed payment of the notes and mortgages made by Moore, and agreed to save Moore harmless from any liability on account of them.

Instead of a finding that the executors did not consent to the settlement, or authorize it to be made, the court should have found that they did not consent to it and authorize it.

The failure of the court to find according to the facts, and the finding of certain material facts being against the evidence, that reason alone was sufficient to authorize the court below to grant a new trial. And even if the evidence had been conflicting, and the court was satisfied that it had erred in adjudicating it, this court would not disturb the decision; for a motion for a new trial is a motion addressed to the sound legal discretion of the court, and the Appellate Court will interfere only

in case of a plain abuse of such discretion. (*Hall v. Bart Emily Banning*, 33 Cal. 525.)

As the court found that the settlement sought to be impeached was made without fraud, it was a material fact to be found that it was authorized by the executors; for if it was a fair and honest transaction, made by the authority of the executors, and in the interest of the estate, it was unimpeachable. Executors and administrators have the legal right to compound and discharge debts due to their testator or intestate. (3 P. Wms. 381; 10 Smedes & M. 404; *Chadbourn v. Chadbourn*, 9 Allen, 173.) "An administrator," says the Supreme Court of Virginia, "is invested with full dominion over the assets of the estate, and with full discretion for the liquidation and settlement of all claims due to or from the estate. He may make settlements and compromises with creditors, and give them confessions of judgments. * * * And if he acts fairly, in good faith, and with due regard to the interests of the estate, the distributees will be bound by his acts, and he will be protected." (*Boyd v. Oglesby*, 23 Gratt. 674.) "An executor is not only bound to compromise and release a debt when the interests of the estate require it, but he would be guilty of culpable neglect if he should fail to do so and lose the debt. He is bound to act in such a case as a discreet and prudent man would act were the debt his own." (*In re Scott*, 1 Redf. 236.)

Such a power belongs to all trustees for the benefit of the trust estate, and they have the right to assume the responsibility of judging of the necessity for its exercise. The circumstances which may render it necessary are presumably better known to them than to any one else. Executors and administrators have, therefore, never been required to obtain preliminary authority for that purpose from the Probate Court, although the judgment had to be ultimately approved by the court when they came to render an account of their trust.

Section 1588 of the Code of Civil Procedure, which provides that, "whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator, with the approbation of the Probate Court or judge, may compound with him, and give him a discharge upon receiving a fair and just divi-

pend of his effects; a compromise may also be authorized when it appears to be just and for the best interests of the estate"—is intended for the protection of executors and administrators, and is not restrictive of their common law powers. "It is not to be doubted," says the Supreme Court of New Hampshire, in construing a similar statute, "that before the passage of the statute an administrator might lawfully compound with a debtor, and receive less than the amount of the debt, if he could show that what he had done was beneficial to the estate. But he acted in some peril in the matter; for if an objection was taken, the burden of proof lay upon him to show that he had acted judiciously, and that the estate had not been prejudiced by the compromise. To obviate this difficulty, and perhaps also to remove doubts upon the subject, the statute has provided a mode in which the administrator, by obtaining a previous authority from the judge, may compromise with a debtor with perfect safety, and without being subjected to expense in sustaining his acts. But the right to compromise, which existed prior to the passage of the statute, is not taken away. It may still be exercised as before, subject to the same limitations and risks." (*Wyman's Appeal*, 13 N. H. 18.) And in *Chouteau v. Suydam*, 21 N. Y. 179, where it was objected that an executor did not obtain the authority of the surrogate to compromise a claim of an estate pursuant to a statute which authorized it, it is said: "The object of the statute was not to confer upon executors and administrators powers which otherwise they would not possess, but to afford them additional protection when acting in good faith in the exercise of their common-law powers. Although they could compromise a claim or compound a debt without the aid of the statute, still they might perhaps be held responsible for any serious error in judgment in so doing. The statute enables them to obtain the sanction of the judgment of the surrogate in addition to their own, and thus affords them additional protection if their conduct is fair and honest."

Besides, the findings in this respect were not only unsustained by the evidence, but some of the findings of law were against law; for the court found, that, of the 113 lots, eleven

of them were sold at auction, and the net proceeds of the sale applied to the extinguishment of a balance due upon the purchase-money of the outstanding title which Holmes had bought in pursuant to the terms of the contract; yet it found, as matter of law, that Holmes was not entitled to be credited with that sum. This decision was contrary to law, because the outstanding title was purchased for the benefit of Holmes and the testator, and the amount paid for it was to be credited upon the balance of the unpaid purchase-money.

Where a finding of fact is against the evidence, and a finding of law is contrary to the finding of fact, it is not error in a court to grant a new trial.

Order affirmed.

McKINSTRY, J., and ROSS, J., concurred.

Power of executor or administrator to compromise claims.—At common law an executor had the right, when the interest of the estate required it, to compromise, compound, or discharge debts due the decedent. Whether or not it be at present necessary or proper to obtain preliminary authority from a Court of Probate, or whether the ultimate sanction of such a court be necessary to the validity of such acts of the executor, depends upon the statutes in the several States. But these statutes do not confer the right, nor have they, in any observed instance, materially interfered with it, or taken it away. *Boyd v. Oglesby*, 23 Gratt. (Va.) 674; *Ex parte Oatman*, 1 Redf. (N. Y.) 284; *Hufnagle's Estate*, 28 Pitts. L. J. 121. In New York the statute (Rev. Stat. 6th ed. 95, § 35) requires that an order be obtained from the surrogate before the executor may compromise any debt due the estate, which may be either a debt due from an insolvent; or one as to which there is doubt as to the liability of the debtor. *Shepard v. Saltera*, 4 Redf. 232. In South Carolina the statute (Genl. Stat. 453, § 9) is held not to affect compromises valid at common law, such compromises being sustained as of course. *Geiger v. Kaigler*, 9 S. C. 401. In Louisiana, if an executor makes a compromise without authority of court he will be liable for the amount of it unless it appear that the debtor was insolvent, or that the liability was doubtful. *Fridge v. Buhler*, 6 La. Ann. 272. But the common law rule is that where an executor makes a compromise in good faith, prudently, and for the benefit of the estate, he is not chargeable with the debt. This is the doctrine in *Wyman's Appeal* (13 N. H.), referred to in the opinion above. *Woolfalk v. Sullivan*, 28 Ala. 548; *Estate of Millenovich*, 5 Nev. 161; *Pusey v. Clemson*, 9 Serg. & R. 204; *Berry v. Parkes*, 8 Smed. & M. 625. Such compromises inure to the benefit of the estate, and never to the benefit of the executor. *Salger v. Wilson*, 4 Watts & S. 501. An agreement by an ex-

ecutor to release a claim of the estate against a debtor in consideration of another creditor releasing his own claim against the same debtor is valid, and within his power. *Davenport v. First Congregational Society*, 33 Wis. 887. An administrator is held, in Louisiana, to exceed his proper functions even by entering into an agreement with the debtor of an estate to extend the time of payment beyond that fixed by the original contract. *Landry v. DeLoa*, 25 La. Ann. 181. *Contra*, *Martin v. Tarver*, 48 Miss. 517. An executor may submit a matter to arbitration, but is responsible as for a *devastavit* if the estate is injured by the award. *Nelson v. Cornwall*, 11 Gratt. (Va.) 724.

SPEED vs. KELLY.

[59 Mississippi, 47.]

CHOSES IN ACTION.—PLACE OF DISTRIBUTION.

The words "all personal property situated in this State" in a statute regulating administrative distribution, do not include money deposited in bank within the State, or a note secured by mortgage on land therein, when the bank-book and note are found at the intestate's foreign domicile, and administration is there granted.

APPEAL from the Chancery Court of Warren county.

John A. Mason died in Louisiana, on January 17, 1881, intestate, leaving him surviving two sisters, a half sister and three half brothers, residents of North Carolina. He owned a residence and other property, and had balances to his credit in the Vicksburg Bank and the Mississippi Valley Bank. He also owned a note secured by mortgage on land in Warren county. Administration was granted in Louisiana, on February 19, 1881, to deceased's physician, the appellee. The bank-books, note and mortgage were found in deceased's residence and duly inventoried. The appellee filed a certificate of his appointment with the clerk of Warren county, and the Chancery Court of that county recognized his authority to act within this State. On February 28, 1881, that court, on the petition of the sisters of the full-blood, appointed appellant, the

law partner of the sisters' counsel, administrator and revoked the order recognizing appellee. This action was without notice to appellee, who petitioned for a rehearing. Pending this contest the Louisiana court decreed an immediate distribution of the estate. Thereupon appellee was re-instated in his office.

G. Gordon Adam, for appellant.

Buck & Clark and Pittman, Pittman & Smith, for appellee.

COOPER, J. On a former day of this term we reversed the decree of the court below, because the record showed the propriety of the appointment of the appellant as administrator of the estate of Mason, there being property (debts due the intestate) in this State, and declined to pass upon all the questions presented by counsel for the appellee, because we considered them prematurely presented, as they ought to arise on an application for distribution, and not upon a motion to revoke the letters of the administrator appointed by the courts of this State. Upon the request of counsel, both for the appellant and appellee, and understanding that the parties now before the court really represent the two classes of distributees, we have considered the case as if it was on proceedings for distribution. The cause is to be decided upon the construction of § 1270 of the Code of 1880, which is as follows: "All personal property, situated in this State, shall descend and be distributed according to the laws of this State regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other States, and notwithstanding the domicile of the deceased may have been in another State, and whether the heirs, or persons entitled to distribution, be in this State or not; and the widow of such deceased person shall take her share in the personal estate according to the laws of this State." On the part of the appellee it is contended: First, that the words "personal property situated in this State" do not include choses in action held by one who dies domiciled in another State; and secondly, if they

do, the statute is unconstitutional, being an attempted distribution of property not within the territorial limits of the State. Careful and extended research has failed to discover in the laws of any other State or country any similar statutory regulation, and we are left to determine from the statute and its subject the fair import of its terms. We begin by saying that we entertain no doubt of the power of the legislature to overturn the fiction of law that personal property has its *situs* at the domicile of the owner, and to make it distributable by the laws of this State; that the character of the property in no manner impairs the power; that the locality given to choses in action, by the fiction that it follows the person of the owner, is as susceptible to be changed and fixed at the place of the residence of the debtor for the purposes of distribution, as the fiction that tangible property is governed by the laws of the domicile may be changed and fixed at the place of the actual *situs* of the property. The fiction is not a rule of international law, but a mere principle, which produces uniformity of judicial action, and is applied by the courts through comity, but which no court would enforce against either a positive statute or the public policy of its State. Whether choses in action are included in the words "personal property situated in this State" is a question in the solution of which we have experienced great difficulty, and which we are unable to determine with entire satisfaction to ourselves. Personal property, whether of a tangible or an intangible character, is considered as located, for the purposes of administration, in the territory of that State whose laws must furnish the remedies for its reduction to possession. When the laws of such State are appealed to for authority and aid, the fiction yields to the fact, and the courts for all purposes of administration enforce the laws of the State under whose authority they act. When, however, in the course of administration, that point is reached at which distribution is to be made, the fund is usually remitted to the domiciliary administrator, but is sometimes distributed by the court having charge of the property, in which event distribution is made according to the law of the domicile. For the purposes of administration, therefore, personal property is

situated in that State in which it is found, or, in cases of choses in action, in which the debtor resides ; for the purposes of distribution it is situated in the State of the domicile of the intestate or testator.

The appellant contends that by the terms of our statute all personal property which is subject to administration in this State is also to be distributed according to its laws, while the appellee argues that the statute applies only to such tangible property as has an actual situation here. The words "personal property," if not limited in their operation by the words "situated in this State," are certainly broad enough to embrace choses in action, and ordinarily we think would include them. The suggestion made in the case of *McIntyre v. Ingraham*, 35 Miss. 25, that the words "personal estate" do not include promissory notes, is not supported by the authorities cited. But the personal property, which the statute declares shall be distributed according to our laws, is personal property *situated in this State*. Without deciding what would be the result if both the evidence of the debt and the debtor were within this State at the death of the intestate, or whether there may not be cases in which, though the evidence of the debt may be in the hands of the intestate at the time of his death at his domicile in another State, the statute might be held to include the debt as situated in this State, we are of the opinion that under the circumstances shown by the record in this cause the choses in action described in the proceedings cannot be considered as personal property situated in this State. A bequest of all one's personal estate, or of all his goods and property, passes his notes and other choses in action. *Anon.* 1 P. Wms. 267 ; *Crichton v. Symes*, 3 Atk. 61 ; *Moore v. Moore*, 1 Bro. Ch. 127. But a bequest of all the personal property situated in a particular place does not pass choses in action, except such perhaps as are usually treated as money.

In *Fleming v. Brook*, 1 Sch. & Lefr. 318, the testator bequeathed to Mrs. Fleming "all my property of whatever nature or kind the same may be that may be found in her house in Duke street, except a bond of F. M. Esq., in my writing-box in the said house contained." Another bond secured by mort-

gage, and the mortgage and several bankers' receipts, at the death of the testator, were found in the house. It was held that neither the bond nor the bankers' receipts passed, because choses in action have no locality. In *Moore v. Moore*, 1 Bro. Ch. 127, a bequest of "all my goods and chattels in Suffolk" was held not to pass a bond found in a drawer in the house in Suffolk, the chancellor saying: "Choses in action have no locality; bonds have no more locality than other choses in action, otherwise than by drawing the jurisdiction of the Ecclesiastical Court."

To the same effect are many other cases. *Jones v. Sefton*, 4 Ves. 166; *Hertford v. Lowther*, 7 Beav. 1; *Penniman v. French*, 17 Pick. 404; *Brooke v. Turner*, 7 Sim. 671; *Green v. Symonds*, 1 Bro. Ch. 129, n.; *Popham v. Aylesbury*, Ambl. 68; *Arnold v. Arnold*, 2 Myl. & K. 365; *Kendall v. Kendall*, 4 Russ. 360; *Rogers v. Thomas*, 2 Keen, 8; *Jackson v. Robinson*, 1 Yeates, 101. And the rule may be considered as settled, that where the words used are broad enough to include choses in action, yet if they fix a locality to the property given they will be considered as excluded, unless there are other words evidencing an intention to include them, because they have no locality. Unless, then, we can construe the statute as fixing the locality in this State of all debts due by persons resident here, the debts due to the intestate are distributable under the laws of the State of Louisiana, in which he was domiciled. Such a construction would greatly simplify the administration of the estates of non-residents, and relieve us from many complications which may and must arise in administrations which are original and independent as to tangible property situated here, and ancillary as to choses in action reduced to possession by the administrator. But the rule is so well established that choses in action have no locality, that we must conclude that the legislature, if intending to abrogate it, would have done so in direct and positive language. It is said that the statutory provision found in our laws had its origin in the desire to protect the institution of slavery, and was adopted to put slave property on the same footing with real estate; whatever may have been the intention of the provision, it is

certainly applicable to all personal property of a tangible character situated here, but we are not able to say that it was intended to embrace choses in action owned by a non-resident, which are entirely disconnected with any business conducted in this State. The rule that such property has its *situs* at the domicile of the owner is universally recognized, and may be said to be as well established as if declared by a positive statute, and we are unwilling to hold it to be abrogated by implication. The decree of the chancellor will be affirmed, but the costs of this proceeding, both in this court and in the court below, will be paid by the appellee out of the funds of the estate.

Decree accordingly.

WEBB vs. DYE.

[18 West Virginia, 376.]

WEIGHT OF TESTIMONY OF SUBSCRIBING WITNESSES.—ADMISSIBILITY OF ATTESTATION CLAUSE.

The question of the due execution of a will is to be determined like any other, in view of all the legitimate evidence in the case; and no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must of course, under ordinary circumstances, give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial.

Upon an issue *devisavit vel non* a certificate of attestation signed by the subscribing witnesses, showing that all the requirements of the statute for the valid execution of the will have been complied with, is proper to go to the jury with the other evidence on the question of the due execution of the will.

A will must be subscribed but need not be proven by two attesting witnesses.

APPEAL from and supersedeas to a decree of the Circuit Court of the county of Ritchie.

The facts of the case are sufficiently stated in the opinion.

Walter S. Sands, and *H. C. Showalter*, for appellants.

John A. Hutchinson, for appellee.

JOHNSON, PRESIDENT. A paper-writing purporting to be the last will and testament of Benjamin Webb, dated the 29th day of August, 1861, purporting to be signed and sealed by the said testator, and witnessed by William Harris and Philip James Frederick, Jr., whose names are signed below the following attestation: "Signed, sealed, published and declared by the said Benjamin Webb as and for his last will and testament in the presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto," was presented to the County Court of Ritchie county on the 10th day of June, 1879, for probate, and the order of the County Court shows, that it "was duly proven by Philip James Frederick, Jr., one of the subscribing witnesses thereto; whereupon, the said Philip James Frederick, Jr., appeared in open court, and being duly sworn, testified that he was present, and the testator, Benjamin Webb, acknowledged the said writing to be his will, although he did not see him sign his name thereto, and he in his presence, at his request, and in the presence of William Harris, the other subscribing witness, who is now deceased, signed his name as a witness thereto," and the signature of said other subscribing witness, William Harris, being proved, the will was admitted to probate. On the 29th day of August, 1879, the plaintiff, John Webb, filed his bill in the Circuit Court of Ritchie county against the proper parties, charging that said paper-writing was not the will of Benjamin Webb, deceased, because at the time said will was attested it was not signed by the said Benjamin Webb, and that the testator never acknowledged the said paper as his will in the presence of the witness, Frederick, &c. The bill further charges, that the testator, at the time the said will purports to have been executed, was of unsound mind, and that undue influence was exerted over him to induce him to make said will, if he did execute the same. The bill prays for an issue *devisavit vel non*. The defendants answer, denying the allegations of the bill.

On the 30th day of October, 1879, the issue was ordered in the usual form, and was tried at the April term, 1880; and on the 29th day of April, 1880, the jury rendered a verdict in favor of the will, which verdict the court approved and dis-

missed the plaintiff's bill. At the trial of the issue the contestants, John Webb and others, saved three bills of exceptions. The first, to the admission as evidence to the jury, of the attestation to the will and the signatures thereto of the subscribing witnesses: the second, to the giving of two of the instructions asked for by the proponents of the will; the third, to the refusal of the court to set aside the verdict of the jury and grant a new trial. Did the court err to the prejudice of the appellants in the matters complained of?

The witness, Frederick, says, in his evidence on the issue, that he did not see the name of Benjamin Webb to the will, when he witnessed it. When recalled, he said: "When I signed my name to the paper * * *, I looked at it to see what names were on it. I saw the seal or scroll on the right hand side but did not see Benjamin Webb's name there." On cross-examination, he said: "I saw the scroll to the paper; that is my recollection about it now. I have since talked to Showalter and Braiden about it. I do not recollect that I saw the name of Benjamin Webb to the paper. I will not say that it was not there when I signed my name, but I do not recollect of seeing it." Frederick was the miller at the testator's mill, and aside from his testimony, it is not shown, what degree of intelligence he possessed. He says he did not read the will or the attestation clause to the will, nor was there any part thereof read to him; that Benjamin Webb came down to the mill, where he was at work, and asked witness to go to his office, saying: "I want you to go to my office and witness a paper for me." "I at once went to the office, and there found Wm. Harris sitting by the window with a paper before him on the desk; he turned to Benjamin Webb and said, 'Squire Webb is this your witness,' to which Benjamin Webb replied, 'Yes, he is.' William Harris then doubled over the paper and said: 'Write your name there,' and I did then write my name in the place as directed by him, in the presence of the said Webb and Harris. Mr. Webb saw me write my name on the paper. There were no other witnesses then present at that time. I then said, 'If you old gentlemen get me into trouble about this, you may look out.' William Harris replied, 'You

need not be afraid, Mr. Frederick, I will be with you.' At the time I signed the paper I think William Harris' signature was on it just above mine. I did not see Harris sign his name to the paper, neither did I see the name of Benjamin Webb thereto. I did not at that time, while in the office, know what the paper I signed was. I did not read the body of it nor the attestation clause, nor was the same or any part thereof read to me; neither did Benjamin Webb or William Harris at that time inform me, while in the office together, what the paper I signed was. Benjamin Webb was not seated while I was in the office; and Benjamin Webb did not say anything while I was in the office, except what I have already said. He said, 'Yes, he is,' in answer to William Harris' question, 'Is this your witness?'"

The will, as well as the order of the County Court, admitting it to probate, was before the jury. The signature of William Harris was proved to be his genuine signature; and it was also proved, that the will and attestation clause were in the handwriting of said William Harris, and that said William Harris wrote a great many legal papers and wills; that he was a magistrate, and familiar with legal papers. From the weight of the testimony there can be no doubt that the signature of Benjamin Webb to the will is genuine.

One witness, Benjamin F. Stewart, testifies, that about the last of August or first of September, 1861, Benjamin Webb took him into a room and fastened the door, and showed him the will in question, and asked his opinion about one of the bequests; and he observed to him that it was not signed, and he said: "He did not know that he ever would sign it, until he was sure Minerva Webb got an equal share of the personal estate with his other children." On cross-examination he said he had married Mr. Webb's sister; said, "I think this is the paper Benjamin Webb showed me. Harris's and Frederick's names were on the paper Benjamin Webb showed me." He had not seen the paper from that time until the trial.

In the presence of the jury the contestants waived the charge of incapacity and undue influence. So the only question before the jury was as to the execution of the will.

The result of the authorities is, that the question of the due execution of a will is to be determined like any other in view of all the legitimate evidence in the case; and no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must of course, under ordinary circumstances, give great weight to their testimony; but it is liable to be rebutted by other evidence either direct or circumstantial. *Orser v. Orser*, 24 N. Y. 52. In that case there were two witnesses to the will, one of whom was dead, and the other testified upon the trial, that the will was not signed, or the signature thereto acknowledged in his presence; and, that it was not declared by the testator to be his will. The certificate of attestation was full, and showed, if true, a perfect compliance with the requirements of the statute. The signatures of the testator and the deceased witness, Yoe, were proved to be genuine, and the body of the will was in the handwriting of the deceased witness, Yoe, who was also shown to have been a justice of the peace, and accustomed to draft and attest testamentary papers. The Supreme Court decision holding the will not executed was reversed.

In *Brinkerhoff v. Remsen*, 8 Paige, 489, it was held, that where an instrument propounded as a will was wholly in the handwriting of a third person and was executed by the decedent merely by signing it, and acknowledging it to be her hand and seal in the presence of the subscribing witnesses, and the instrument was not read, nor was anything said at the time, from which the witness understood it to be a will, it was not duly executed and published by the executrix so as to make it a will, valid under the provisions of the statute, although the attestation, which was not read by or in the hearing of the witnesses, stated the will to have been duly published in the presence of such witnesses. It was in this case further held, that where the subscribing witnesses to a will have subscribed their names as witnesses at the end of the attestation clause, showing that all the formalities requisite to the execution of a valid will were complied with, the mere inability of the witnesses to recollect that the testator published the instrument as his will, is not sufficient to invalidate the same; but if the witnesses recollect and declare on oath, that the testator did not declare

the instrument to be his will, and that the attestation clause was not read and understood at the time of the execution, the will was not duly executed under the statute. In that case both the subscribing witnesses expressly disproved the statements in the attestation, to which they had subscribed their names. To the same effect is *Lewis v. Lewis*, 11 N. Y. 221.

In *Nelson v. McGiffert*, 3 Barb. Chy. 158, it was held, that where one of the subscribing witnesses to a will swears, that all the formalities required by the statute were complied with in the execution thereof, the will may be admitted to probate, notwithstanding the other subscribing witness may not be able to recollect the fact; and, also, where the attestation clause of a will states, that the will was signed, sealed and published by the testator as his last will and testament in the presence of the attesting witnesses, who, at his request and in his presence, subscribed their names as witnesses thereto, this after a considerable lapse of time, and when it may be reasonably supposed, that the particular circumstances attending the execution of the will have escaped the recollection of the attesting witnesses, is a circumstance, from which the court or jury may infer that the requisites of the statute were complied with.

In *Peck v. Carey*, 27 N. Y. 9, it was held, that the signature of the testator or his acknowledgment thereof in the presence of the attesting witnesses and his publication of the instrument as his will, were proved by the attestation clause and the surrounding circumstances, though, after the expiration of two years none of the witnesses could testify that they saw the testator sign the will or heard him acknowledge his signature, or heard the attestation clause read, which distinctly affirmed the signature and publication of the will.

In *White v. Trustees of the British Museum*, 6 Bing. 310, it appeared, that the paper-writing in question was wholly in the testator's handwriting except the names of the witnesses; that White signed it before it was signed by the witnesses or either of them; that about five months before his death he requested two of the witnesses to sign their names to the said writing, which they did in the presence of said White; but

they did not see the signature of said White to the said paper-writing, and were not informed at that or any other time by said White, what was the nature of the said writing, or the purpose, for which he requested them to sign it; that about three months before his death, said White requested the other witness to sign said paper-writing, which he immediately did in White's presence, and was then informed by said White, that said paper-writing was his will; that said paper-writing consisted of two sheets, which were both in the same room, at the time the respective signatures of the three witnesses were placed thereto; and that said White was of sound and disposing mind and memory, at the time he signed the paper, and at the times the witnesses subscribed their names thereto. It appeared from the inspection of the said paper-writing, that the signatures of the three persons thereto could not have been placed there with any other purpose than to make them witnesses to the will; and that immediately above their signatures there was written in the handwriting of the testator these words: "In the presence of us as witnesses thereto." Tindal, C. J., quoted the Statute, 29 Car. II, ch. 3, § 5, as follows: "That all devises and bequests of any lands or tene-ments shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect," and held, that the will was executed as the statute required, concluding his opinion in these words: "When, therefore, we find the testator knew this instrument to be his will, that he produced it to three persons and asked them to sign the same, that he intended them to sign it as witnesses, that they subscribed their names in his presence and returned the same identical instrument to him, we think the testator did acknowledge in fact though not in words to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the statute, if the case were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare ac-

knowledge of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such an acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of the signing, we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made; and we do, therefore, upon the principle of these decisions, hold the execution of the will in question to be good within the statute.

In *The Goods of Ann Rawlins*, 2 Curteis, 326, there was a motion to probate the will of said Ann Rawlins. It appeared that the deceased signed her name to the will not in the presence of witness, and shortly afterwards produced the will before two witnesses, and said: "Sign your names to this paper," which they did; it was held, not to be an acknowledgment of her signature, under the 9th sec. of 1 Vict. ch. 26. Sir Herbert Jenner said: "Can the signature to this will be said to have been made or acknowledged by the testatrix in the presence of the witnesses, as required by the 9th sec. of the statute? From the affidavit it appears, that all the deceased did was to request the witnesses to sign their names to the paper-writing, saying it was a will, or that the signature was hers; I cannot hold this to be a sufficient compliance with the statute, and I must reject the motion."

In *Chambers & Yatman v. The Queen's Proctor*, 2 Curteis, 415, of the three witnesses to the will, two deposed that the testator did not sign the will in their presence, the other, that he did, the court believing from the evidence that the testator did sign the will in the presence of the witnesses, declared it to have been duly executed. The attestation in that case, over the signatures of the three witnesses, was as follows: "Signed, sealed, declared and delivered by the said testator, Thomas Thompson, as his last will and testament in the presence of us."

In *Blake v. Knight*, 8 Curteis, 547, neither of the three subscribing witnesses to the will of Edmund Blake, remembered that his signature was to the will, when they signed it.

William Brewer said: "I did not see the name 'Edmund Blake' at that time, as I see it now opposite the seal and at the end of the will; there was no seal there then; of that I am certain; I do not think that the name was there then, but I do not swear to that." The next witness to the will, Charles Sellick, said: "I will swear to the best of my belief, that the name 'Edmund Blake,' appearing at the foot or end of the will, between the clause of attestation and the seal was not written, that is, had not been written, and was not upon it, when I wrote my name as a witness. I was a youngster; I was unused to the form of such things; I did not think anything of it; I am quite certain that the seal was not there at the time now deposed of. I will not swear positively that the name was not there, but only that I do not remember it." The third witness could not remember whether either signature or seal was there, when he signed as a witness. There was other evidence and circumstances in the case. Sir Herbert Jenner said: "I cannot entertain a doubt, that this paper was signed before the witnesses subscribed. I have no more doubt of the fact, than if they had positively sworn to that effect. When I look to the care and caution with which the paper is prepared, the knowledge of the deceased in testamentary matters, derived from his occupation in a solicitor's office, he must have known how to give validity to a testamentary paper in the year 1838. No doubt the memory of the witnesses fails them with regard to circumstances happening nearly four years ago. The court cannot safely trust to the memory of witnesses under such circumstances; it must attend to the facts of the case, and say whether it is satisfied that the name of the deceased was written to the will when the witnesses signed it; whether it was signed in their presence or signed beforehand, and acknowledged in their presence. The deceased saying that the will was all in his handwriting, if the court is satisfied, that the signature was then written, would be sufficient as an acknowledgment of his signature.

* * * The result to which I come is, that the court is not bound to have the positive affirmative evidence of the subscribing witnesses. I am quite satisfied, that the name of the

testator was signed to the paper before the witnesses subscribed; and I think his acknowledging this to be his will, it being all in his own handwriting, and his name, as I hold, being then signed to it, amounts to a sufficient acknowledgment of his signature. I pronounce for the validity of this paper as a will; and I direct the probate to be delivered out to the executor."

In *Dudleys v. Dudleys*, 3 Leigh, 436, it appeared, that upon a question of probate, the testimony of one of the attesting witnesses was directly contradicted by another; the County and Circuit Court, both gave credit to the witness *for* the will. On appeal from the sentence of probate it was held, that the Court of Appeals on a mere question of credibility of witnesses, will always presume that the inferior courts, which saw and heard the witnesses examined, decided correctly.

In *Clarke and others v. Dunnivant*, 10 Leigh, 13, a will more than eight years old, attested by three witnesses, being offered for probate, one of the witnesses proved, that being casually present at the testator's house on a particular occasion which he minutely described, the will was produced, read to the testator (who it appeared could neither read nor write), signed for him by the witness and acknowledged by him as his will in the witness' presence, who, thereupon, subscribed as attesting witness in the presence of the testator. The other witnesses prove merely their signatures, and that they would not have subscribed, unless they had been requested by the testator, and had thought that all things were regular, having forgotten all the circumstances of their attestation, except that they were present at the testator's house on the occasion described by the first witness; and one of them stated, that if requested by the testator to attest his will, he would have done so, whether the testator were present or not, when he subscribed his name, while the other admitted that he did not know in what manner the law required a will to be witnessed. The court held, that though the attesting witnesses to a will have forgotten whether material requisitions of the statute were observed in the execution and attestation or not, compliance with these requisitions may nevertheless be properly

inferred by the Court of Probate from the circumstances of the case.

In *Jesse et als. v. Parker's Adm'rs et als.*, 6 Gratt. 57, it appeared that Dr. Z. Tally wrote the will of Jeremy Parker; the name of the testator was written to the will by Dr. Tally, and the name of himself, Jane Sanderson and Sally C. Southall, were signed by him as attesting witnesses to the will. Sally C. Brown, formerly Sally C. Southall testified, that she did not sign her name to the will. The reason she did not was, that she thought it would answer as well for Dr. Tally to write it. After stating when and how the paper was written by Dr. Tally, she said, that as soon as the paper was written Dr. Tally got up and said to them: "You all come in here," and she went into the testator's room, and Dr. Tally standing on the floor, near the bed on which the testator was lying, read the will, and that nothing passed that she heard, between Dr. Tally and the testator before reading the paper, and after Dr. Tally had read the paper, he asked Mr. Parker if that was his will, or if he acknowledged that to be his will (she was not certain of the words, but one or the other was said), and she understood Mr. Parker to say "Yes." That she could not be certain that Dr. Tally read the paper loud enough to be heard by Mr. Parker. Dr. Tally testified to the particulars of the execution of the will. Jane Sanderson testified, that her name was not put to the will by her authority, and she did not consider herself a witness to the will. She considered the testator almost dead at the time the will was read to him by Dr. Tally, but she was not able to say, whether he was or was not able to understand the paper, or know what he was doing. The jury upon the issue *devisavit vel non* found in favor of the will. There was a motion to set aside the verdict and grant a new trial, which was overruled in the court below. Allen, J., speaking for the whole court, said: "The court is of the opinion, that as the jury were the proper judges of the weight and credit due to the testimony of the witnesses, the verdict in favor of the will sanctioned by the opinion of the court, before which a trial of the issue was had, has concluded all mere questions of fact depending upon the credit to be given

to the witnesses. The court is, therefore, of opinion, that upon this record it must be taken, that all the requirements of the statute in order to establish a will were satisfactorily proved." The court further say: "That although there must be satisfactory proof, that every statutory provision has been complied with in order to establish a will, the law does not prescribe the mode of proof, nor that the will shall be proved, as well as attested, by a specific number of witnesses. If such proof were to be required from each subscribing witness, the validity of wills would be made to depend upon the memory and good faith of a witness, and not upon reasonable proof, that all the requirements of the statute had in fact been complied with."

In *Youngby, &c. v. Barner et als.*, 27 Gratt. 103, Staples, Judge, who delivered the opinion of the court, says: "It is held, upon good authority, that a person who signs his name as a witness to a will, by his act of attestation solemnly testifies to the sanity of the testator. If he afterwards attempts to impeach the validity of the will, his evidence is not to be positively rejected, but it is to be received with the most scrupulous jealousy." The same principle was affirmed in *Lamberts v. Cooper's Ex'r et als.*, 29 Gratt. 61, and *Cheatham v. Hatcher et als.*, 30 Gratt. 56. In the two latter cases it is clearly held that the testimony of a subscribing witness invalidating a will ought to be viewed with suspicion.

Was it error for the court to admit in evidence, to be considered by the jury, the attestation clause to the will of Benjamin Webb? It has been repeatedly held, in Virginia, that it is not necessary for a certificate of attestation to be annexed to the will; that no form of attestation is necessary. But if there is an attestation over the signatures of the subscribing witnesses, it is proper that it shall go to the jury with the other evidence, to be considered by them upon the question of the due execution of the will. If, as we have seen, where the names of the subscribing witnesses have been placed to a will without any form of attestation whatever, and the witnesses have forgotten what occurred at the time the will was executed, the law will presume that every requirement of the

statute was complied with, it seems to me that presumption would be strengthened if the certificate of attestation, to which the attesting witnesses subscribed their names, shows that every requirement of the statute was in fact complied with, especially after the lapse of eighteen years, as in this case.

It is asserted that the court erred in giving the third and fourth instructions at the instance of the plaintiff in the issue. The third instruction is, "that the acts and conduct of said Webb on the alleged occasion of the execution of said paper, taken in connection with the attestation clause of said paper and the genuineness of the signatures of the subscribing witnesses thereto, are to be considered by the jury in determining whether the paper in question is the will of said Benjamin Webb." The instruction is proper. There was no controversy about the genuineness of the signatures of the subscribing witnesses; and the instruction amounts to no more than saying that the jury is to consider, as proper evidence before them, the acts and conduct of the testator, together with the fact of the attestation of said paper and the genuineness of the signatures. It was certainly proper that the jury should consider all this. The fourth instruction is, "that although the surviving subscribing witness, Frederick, may not testify, that all the formalities prescribed by law were observed at the time of the alleged execution of the paper in question as the will of Benjamin Webb, and as contained in the attestation clause of said paper, yet the jury, taking into consideration the said attestation clause, as well as the facts and circumstances attending the transaction, may determine that the said paper is the will of Benjamin Webb, notwithstanding the testimony of the said witness, Frederick." In *Orser v. Orser*, *supra*, the instruction was asked: "That although the surviving witness, Acker, had sworn that the testator did not acknowledge the signature to the will or comply with the other requisitions of the statute, the jury had, nevertheless, a right to find that he did make such acknowledgment from the evidence supplied from the certificate of attestation." The Court of Appeals held, that had the words "and from the other circumstances

proved in the case" been added, the judge would have been bound to have given the charge. The instruction is proper. As we have seen, the evidence of a surviving subscribing witness against the validity of a will must be viewed with suspicion, and it being a question whether the will was in fact executed according to the requirements of the statute, if the jury were convinced, from all the facts and circumstances surrounding the testator, that the will was, in fact, executed as the law required, they may so find, notwithstanding the fact that the surviving subscribing witness may swear that all the requirements of the statute were not met. A will must be subscribed, but need not be proven by two attesting witnesses. *Cheatham v. Hatcher et als.*, 30 Gratt. 56.

As Judge Staples in the above case justly remarks, it is a wise rule which authorizes the material facts to be proved by one of the subscribing witnesses, or even by other competent testimony; and if it were otherwise, the proof of a duly attested will might be defeated by the forgetfulness or perjury of some of them.

To prevent the jury from being misled in possibly supposing that the court intended to say to them, that the evidence was sufficient to establish the will notwithstanding the testimony of Frederick, it would have been better to have modified the instructions by the words, "if you believe from the evidence, that it was signed or acknowledged in the presence of the attesting witnesses thereto." But the jury could not have been so misled, for the court had, at the instance of the contestants, given four very strong instructions bearing on the requirements of the statute in the execution of a will. The first recited the requirements of the statute and instructed the jury that the burden of proof is on the plaintiff in this issue to establish, to the satisfaction of the jury by a preponderance of evidence, that the above statutory requirements were complied with, in reference to the paper-writing purporting to be the last will and testament of Benjamin Webb, deceased, in controversy in this cause, and unless the jury are so satisfied, they must find the issue for the defendants. The second instructed the jury that, unless they believed that the signa-

ture of Benjamin Webb to the will was genuine, they must find for defendants. There was no claim that the signature was written at the request of testator by another. The third instructed the jury that the witnesses to a will attest a perfect instrument, an instrument signed by the testator, not a paper without a signature; and unless the jury believe from the evidence that, at the time of the attestation of the paper-writing in controversy by William Harris and Philip James Frederick, the subscribing witnesses thereto, the genuine signature of said Benjamin Webb had been affixed by him thereto, then the said paper-writing is not the will of said decedent, and the jury must find the issue for the defendants. The fourth instructed the jury that no statements made by the said Benjamin Webb, to any person other than the said William Harris and Philip James Frederick, when present at the same time, acknowledging the said paper-writing to be his will, are to be considered by the jury in determining the question of the due and legal execution thereof."

This instruction was asked and given in view of the evidence that, on the 6th day of June, 1878, the testator showed the said paper to witness Mitchell, and told him that it was his will, and wanted the witness to make a mark on it, which he did, by putting the above date thereon; and, also, of the evidence of the witness Davis, who stated that, in 1879, the testator showed him the same paper and told him, that it was his will. This evidence was evidently admitted on the controversy as to the genuineness of the signature.

The fifth instruction was, "that unless they believe from the evidence, that the said Benjamin Webb acknowledged the said paper-writing to be his will, or acknowledged the same to be his act, in the presence of both the subscribing witnesses thereto, when present at the same time, they must find the issue for the defendants therein; and the said acknowledgment must have been made when the said paper-writing was a perfect instrument by having the genuine signature of said Benjamin Webb affixed thereto."

I do not say whether these instructions propound the law correctly or not. I quote them to show that the jury could

not have misunderstood or been misled by the fourth instruction, given at the instance of the plaintiffs in the issue.

Should the verdict of the jury have been set aside and a new trial granted? Where, upon an issue *devisavit vel non*, a motion is made to set aside the verdict and grant a new trial, and all the evidence is set out in the bill of exceptions, the Appellate Court will reject all the parol evidence of the exceptor, which is in conflict with that of the other party; and if upon the evidence of the appellee and written evidence of the appellant, the case is in favor of the appellee, the court will not disturb the verdict. *Lamberts v. Cooper's Ex'rs et als.*, 29 Gratt. 61; *Nease et al. v. Cupehart's Ex'r*, 15 W. Va. 299, and cases cited. This rule would, upon a review of the action of the court in refusing a new trial, exclude entirely the consideration of the testimony of B. F. Stewart, whose testimony certainly could not have been believed by the jury. He swore most positively, that a short time after the 29th of August, 1861, when the will purports to have been executed, Benjamin Webb, the testator, showed him the same paper-writing here in controversy, and that he called his attention to the fact that he had not signed it, and the testator replied that "he did not know that he ever should sign it, until he was sure Minerva Webb got an equal share of the personal estate with his other children." Stewart says the names of the subscribing witnesses, Harris and Frederick, were there, but that Benjamin Webb's name was not there. The jury could not have believed him and have rendered the verdict they did. They had a right to disbelieve him. We have not the right to say that the verdict of the jury should be set aside because the testimony of this witness was disregarded. If there was sufficient evidence before the jury after excluding all the parol testimony of the exceptor, the verdict must stand. The will itself was before the jury with the signature of Benjamin Webb affixed thereto. The signatures of both attesting witnesses were proved, and the attestation-certificate, which is full, and contains all and more than all the statute requires for the execution of a will. The fact is proved, that the body of the will and the certificate of attestation are in the handwriting of

the deceased subscribing witness, William Harris. It is also proved that said William Harris was a "magistrate," and wrote many wills, and was familiar with testamentary papers; that Frederick, the other attesting witness, was a miller, and nothing is shown as to his intelligence, or that he had any knowledge of testamentary papers. The will was executed nearly eighteen years before the testator's death, and even Frederick finally says: "I do not recollect that I saw the name of Benjamin Webb to the paper. I will not say it was not there when I signed my name, but I do not recollect of seeing it." It seems to me the evidence is ample to sustain the verdict of the jury after excluding the conflicting evidence of appellee.

The decree of the Circuit Court is affirmed, with costs and \$30 damages.

Judges Haymond and Green concurred.

Decree affirmed.

See *Brown v. Clark*, 1 Am. Prob. R. 510, and cases in note; *Abbott v. Abbott*, Id. 326.

PIPER vs. MOULTON, EXECUTOR.

[72 Maine, 155.]

WHO MAY BE ATTESTING WITNESSES.—PERPETUITIES.—CHARITABLE BEQUESTS FOR EDUCATIONAL PURPOSES.—TOWNS AND CITIES AS TRUSTEES.

The wife of an executor not beneficially interested under the will is a credible attesting witness thereto.

An inhabitant of a town to which a bequest is made for the support of schools therein is a competent attesting witness.

The probate of a will, where the court has jurisdiction, is conclusive unless vacated by an appeal.

Towns or cities may hold in trust funds given for the purposes of education.

A testator made a bequest of one hundred dollars to a town, in trust, on condition,

that the town should expend the income thereof, forever, to keep his lot in a certain burying ground in good order and condition, and an iron fence around the same; and made another bequest to the town of the rest and remainder of his estate to establish a school fund, on condition that said town should accept and perform the conditions as to his lot in the burying ground. *Held,*

1. That the bequest of the hundred dollars was not for a charitable use, and was void as creating a perpetuity.

2. That the bequest to establish a school fund was valid. The condition to keep the testator's lot in repair was a condition subsequent. The estate passes to the town subject to the condition subsequent if valid; if void or against law, discharged of the condition.

3. The bequest being on condition that the town erect a building for the Piper High School, that the town is authorized to raise the amount of money necessary for that purpose.

BILL in equity.

Heard on bill, answer and proof.

The opinion states the case.

J. H. Hobbs, for plaintiff.

Ira T. Drew, for defendant.

APPLETON, C. J. Elisha Piper, on September 19, 1876, made and executed his last will and testament. He died March 22, 1877. On the first Tuesday of June, 1877, his will was presented for probate and proved and allowed.

After referring to his heirs-at-law and declaring in the first item, that he shall not give them anything, the will proceeds as follows:

"All my estate is the result of my own earnings and of economy in the care and management of the same, and I feel that my relatives should not question my right to carry out what has been a well considered and settled purpose with me, viz.: To dispose of my property in such a manner as will in my judgment do the most good and be of the greatest benefit in promoting popular education; and whereas the town of Parsonsfield, in the county of York, aforesaid, is my native town, in which I have always felt a great interest, and the inhabitants thereof are interested in the maintenance of good schools, I feel safe in the creation of the trust hereafter provided.

"*Second*, I give and bequeath to the inhabitants of Parsonsfield, in the county of York and State of Maine, the sum of one hundred dollars to have and to hold the same forever, in trust, for the following purposes, namely, to expend the interest and income as may be necessary to keep my lot in the Piper burying ground, situate at South Parsonsfield, in good order and condition and an iron fence around the same in good repair and painted.

"*Third*, I give, bequeath and devise all of the rest and residue and remainder of my estate, both real and personal, after the payment of all my just debts and burial expenses, to the inhabitants of the aforesaid town of Parsonsfield, to have and to hold the same in trust forever, and to be called the 'Piper school fund,' to and for the uses and purposes hereinafter mentioned and declared, namely, that the interest and net income thereof shall be annually expended in aid of the support of a free high school in said Parsonsfield, that is to say, a school which shall be open and free to all residents of said Parsonsfield without charge for tuition, not intended, however, to restrict the right of said inhabitants to charge tuition for scholars admitted to said school, who are not residents of said Parsonsfield; that no part of said money shall ever be expended in the erection or repair of school buildings, but the entire use, income and interest, arising and accruing from the estate hereby bequeathed, shall be forever expended for instruction and payment of incidental expenses, necessary for the support of said school.

"The expenditures of said money shall be under the direction and control of the superintending school committee of said Parsonsfield or such officers as may be by law provided in their stead; this devise is upon the express and certain condition that the inhabitants of said Parsonsfield shall accept and perform the conditions named in the second article of this will."

The heirs-at-law bring this bill to determine the construction of and the effect to be given to the trusts declared in the will, at the same time denying the will to have been duly attested by competent witnesses.

1. It is objected that the will was not properly executed,

because the attestation of the testator's signature was by interested witnesses.

The wife of the executor was one of the attesting witnesses. But the executor was a competent witness at the time of the attestation of his wife. He might legally have been an attesting witness. *Jones v. Larrabee*, 47 Maine, 479. The husband not being then interested his wife was not "beneficially interested" under the will and was a "credible attesting witness."

The other attesting witnesses were inhabitants of Parsonsfield. But that fact would not prevent their being attesting witnesses. In *Eustis v. Parker*, 1 N. H. 273, this precise question arose in a case where the attesting witnesses were inhabitants of a town to which a bequest for the support of schools had been made, and they were held competent. Their interest, as inhabitants, was not direct and certain. If they might be benefitted by the reduction of taxes, which might thereafter be assessed, they might die, or move from the town and cease to be inhabitants of the same, at the time of a subsequent assessment. Their interest was contingent. *State v. Stuart*, 23 Maine, 111. The increased privileges of education do not constitute a disqualifying interest. *Warren v. Baxter*, 48 Maine, 195; *Hawes v. Humphrey*, 9 Pick. 350.

But if it were otherwise and the witnesses were to be deemed interested, the objection is not open to the complainants. The Probate Court had jurisdiction. If it erred, the error might be corrected on appeal. Whether the questions arising in the Probate Court were correctly or incorrectly decided as to the competency of evidence, can never be made a matter of inquiry in a court of common law to affect that adjudication. *Patten v. Tallman*, 27 Maine, 17. The probate of a will is final and conclusive upon all parties. *Dublin v. Chadbourn*, 16 Mass. 433. The decisions of the judge of probate in all cases within his jurisdiction are conclusive against all the world unless vacated by an appeal. *Tibbets v. Tilton*, 4 N. H. 121; *McLean v. Weeks*, 65 Maine, 411.

A trust for the support of schools or of a particular school as a high school, or for any purpose of general public utility, is a valid trust. So towns can hold property in trust for purposes

within the general scope of their corporate existence. Thus, towns and cities may hold property in trust for the purpose of assisting the poor, and the relief of those who are poor and not paupers. *Sutton v. Cole*, 3 Pick. 282; *Webb v. Neal*, 5 Allen, 575; *Everett v. Carr*, 59 Maine, 325; *Vidal v. Germantown*, 2 How. 188; *Drury v. Natick*, 10 Allen, 169; *Second Religious Society in Boxford v. Harriman*, 125 Mass. 321; *Attorney General v. Butler*, 123 Mass. 305; Stat. 1873, c. 92.

But the devise to the inhabitants of Parsonsfield was "upon the express and certain condition that the inhabitants of said Parsonsfield shall accept and perform the conditions named in the second article of this will."

Those conditions are that said inhabitants should have and hold forever the sum of one hundred dollars in trust to expend the interest and income as may be necessary to keep the testator's lot in the Piper burying ground in South Parsonsfield in good order and condition and an iron fence around the same in good repair and painted.

Here is provision for a perpetuity. The amount devised is to be held forever in trust for certain purposes. Whether the amount thus to be held be great or small is immaterial. The true question is whether this is a gift for a charitable use.

A charity is a gift to any general public use, extending to all rich or poor. "Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins. So, if a gift for a private purpose tends to create a perpetuity, it will be void; but a gift for a public charity is not void, although in some forms it creates a perpetuity." 2 Perry on Trusts, § 687. "Charity is defined to be a general public use." 1 Jarman on Wills, 192. Courts have been exceedingly liberal in not restricting the objects to be regarded as charitable. "But," observes Gray, C. J., in *Drury v. Natick*, 10 Allen, 169, "the gift must be expressly or by necessary implication for the public benefit. Therefore a private museum or a library established by private subscription for the use of subscribers, has been held not to be a charity." In *Carne v. Long*, 2 De Gex, Fisher & Jones, 75, the devise was to the

trustees of the Penzance public library, an institution established and kept on foot by the subscription of certain inhabitants of Penzance for purchasing books for the use of the subscribers; the books to be vested in trustees for the use of the institution, to continue as long as there were ten subscribers. It was held that this was not a charity. "The devise," says Lord Campbell, "is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property is to be taken out of commerce and to become inalienable, not for a life or lives in being, and twenty-one years afterwards, but for so long as ten members of the society shall remain. This seems to be a purpose which the law will not sanction as tending to a perpetuity." The chancellor held this to be no charity, but a devise for the benefit of a society of certain individuals.

The bequest of one hundred dollars to keep the testator's lot in the Piper burying ground forever in repair, was not for any public purpose, beneficial to all, rich or poor. It was not a charitable use, for which a perpetuity might be created. "A condition for keeping a tomb in repair," observes Kindersley, V. C., in *Lloyd v. Lloyd*, 10 E. L. & Eq. 130, "is not a charitable use, and is not illegal. It may be illegal to vest property in trust for that purpose, so as to create a perpetuity; but a direction that the wife and Mary A. Lockley are, during their lives, to enjoy the annuity and are to keep the tomb in repair, is quite lawful." The tomb was to be kept in repair during their lives. There was no perpetuity. In *Richards v. Robson*, 31 Beaven, 244, the bequest was to keep up the graves and gravestones of certain persons in good repair. The bequests were to the church wardens in perpetuity. The court say the keeping up the tomb or building, which is of no public benefit, is not a charitable use and the bequests were declared void. In *Hoare v. Osborn*, 1 L. R. Eq. 583, a gift to keep in repair forever the vault, in which the testator's mother was interred, was held void, as not being a charity. To the same effect is the case of *Fisk v. Attorney General*, 4 L. R. Eq. 521, and *In re Williams*, 5 L. R. Ch. Div. 735. In *re Burkitt*, 9 L. R. Ch. Div. 576, a certain sum was bequeathed, "the income to be applied,

when necessary, in keeping in good repair the grave, the railing and tombstones of my late father;" the residue over and the portion of the gift for keeping the grave in repair was held void.

In *Dexter v. Gardner*, 7 Allen, 243, a bequest in trust forever, the income of which was "to be appropriated for the benefit of the Friends' meeting," in a particular place, is a charity, and not void as a perpetuity, it appearing that the Friends under their usages and discipline apply the funds to the maintenance of religious worship, &c., and for the purchase and repair of burying grounds, the latter being regarded as a religious duty. It was contended that the latter purpose was not a charity; but the court held the providing and oversight of a burying ground for this sect of christians, as a religious duty, could not be distinguished from that of repairing and maintaining meeting houses for religious worship, and sustained the trust. In *Swasey v. American Bible Society*, 57 Maine, 527, it was held that a legacy to keep in repair a family burying ground, might be sustained.

But this is not even to keep in repair the family burying grounds. It is simply to keep in repair his (my) lot, not the Piper burying ground. It is not for any charitable purpose. It is for a merely secular object. It is not even for all of his family or name, rich or poor. It is not for any general purpose of public interest. 1 Tudor's Law of Charitable Trusts, c. 1, § 14. "The erection of a monument to perpetuate the memory of the donor, is not a charitable purpose; nor is the repairing a vault or tomb containing his remains; *contra*, it seems, if the vault be used for the interment of the donor's family." 1 Jarman on Wills, 238, 4th Am. ed.

Assuming the bequest in perpetuity to keep in repair the testator's lot in the Piper burying ground to be void, the counsel for the complainants in his able argument relies upon the case of *Fowler v. Fowler*, 10 Jur. N. S. 648, as showing that the gift, the income of which was to be applied to keeping the tombs of the testator and family in repair, is void as tending to a perpetuity, and if so connected with a gift over as to be inseparable, both will be held void. It appeared in that case that

Rev. W. Fowler, by his will directed his executors and executrix "to invest and set apart £500 in government securities * * * upon the permanent trust of appropriating the income in and toward the maintenance in good order of the graves and gravestones, with the railing now inclosing the graves in Baldock church yard of my late wife and others, the surplus of such year's income to the rector of Baldock for the time being for his own use."

Both counsel admitted the gift of income for the maintenance of the graves was void. The question was whether this fact invalidated the subsequent bequest to the rector of Baldock, as the sum necessary for carrying into effect the first was not capable of being ascertained. Sir John Romilly, M. R., in his opinion, says, "the difficulty is that it is contended the gift is altogether void, and cases cited establish that position; that if a sum of money be given, part of which is to be applied to purposes which cannot be ascertained or which fail, and the remainder is given to other purposes, the whole gift fails, because of the invalidity of the first portion of the gift * * * although I cannot understand the principle in these cases, it is so well established by authority, I must hold the gift of the overplus void. I think I am bound by the cases *Chapman v. Brown*, 6 Ves. 404, and the *Attorney General v. Hinxman*, 2 J. & W. 270, and as I cannot determine in what way the amount necessary to keep the tombs in repair is to be ascertained, I cannot determine the amount given to the rector of Baldock for the time being. I am of opinion that the whole gift fails." The uncertainty of the amount necessary for repairs is the basis of the decision, but in the case at bar the uncertainty relates only to the fraction of the hundred dollars given for the purpose of repairs, and to nothing else.

But if possible the will of the testator should be sustained. His primary object, "his well considered and settled purpose" was to dispose of his property "to do the most good and be of the greatest benefit in promoting popular education" in the town of Parsonsfield. Is that purpose to be defeated by reason of a gift which cannot be sustained? The Piper high

school was the paramount purpose, regardless of any claims of his relatives, which he entirely negated.

In *Hoare v. Osborn*, 1 L. R. Eq. Cases, 587, Kindersley, V. C., says: "The one third of the fund attributable to the gift for the repair of the vault, which is void, falls into the residue." In *Fisk v. Attorney General*, 4 L. R. Eq. Cases, 521, the bequest was of 10,001 consols to the rector and church-wardens of a parish, and their successors upon trust to apply such of the dividends as should be necessary or required in keeping her family grave in repair, and to pay and divide the residue every year forever amongst the aged poor of the parish. Sir W. Page Wood, V. C., after examining the authorities, concludes thus: "There will be a declaration that the legacy of 10,001 given to the rectors and church-wardens of St. James, Liverpool, is a good gift, and that they take the same discharged from the obligation of keeping in repair the family grave of the testatrix."

The decision, *Fowler v. Fowler*, relied upon by the counsel for the complainants, is made by Romilly, V. C., to rest upon the cases of *Chapman v. Brown*, and the *Attorney General v. Hinaman*, though in his opinion he states he could not understand the principle upon which they were determined. In *Mitford v. Reynolds*, 1 Phillips' Ch. 189 (19 Con. Ch.), those cases were considered and the amount necessary to comply with that portion of the will providing for a monument was referred to a master to ascertain the sum needed for that purpose. In *re Williams*, 5 L. R. Ch. Div. 735, the case of *Chapman v. Brown* was considered as overruled. In that case there was an invalid trust for the repair of tombs, and a disposition of the remainder. "In this case," remarks Manlius, V. C., "if the first gift cannot take effect, there is no reason whatever why the whole fund should not be applied to the second object. If the first gift had taken effect, only a small part of the fund would have been absorbed. It is, therefore, only so much as is required for the illegal purpose which is abstracted. The gift being void, none is required, and consequently the entire fund remains applicable to the valid purpose." In *re Burkett*, 9 L. R. Ch. Div. 576, a bequest was made to keep in repair the

grave, railing and tombstone of A., the residue to the poor of U., it was held that the first purpose of the gift being invalid, the whole was applicable to the charity. "If," says Jessell, M. R., "a man were to give an income of £10,000 a year, on trust, in the first place to keep his father's tombstone in repair, which under no conceivable estimate could exceed £20 a year, directed the residue of the £10,000 a year, to go to charity, I should assume that good law, which always means common sense, and common sense would concur in holding that the £20 gift was void, and that £9,980 was given in charity. I should have no difficulty whatever in saying that was the law."

"It may well be doubted," observes Gray, J., in *Giles v. Boston, W. & F. Society*, 10 Allen, 355, "whether this condition to maintain a private tomb or burial place, was not void as tending to create a perpetuity." In *Dawson v. Small*, L. R. 18 Eq. 114, the testator bequeathed to his executors £600, out of his personal estate upon trust, to invest and apply the income, in keeping in good repair all the tombstones and headstones of his relatives and himself in G. churchyard, and directed that any surplus that might remain after defraying yearly the expenses before stated, should be given by his executors every year to poor pious members of the Methodist society above fifty years old. *Held*, that the trust to keep the tombstones in repair being honorary only, the whole £600 was well given for the benefit of the Methodist poor, *discharged from the obligation of keeping the tombstones in repair*. "The obligation to keep up the tombstones," observes Sir James Bacon, V. C., "is merely honorary, but the obligation to give all that is not applied for the purposes first mentioned, is by no means honorary; it is a trust that must be executed." So, in the case at bar. In *Hornberger v. Hornberger*, 12 Heisk. (Tenn.) 635, the court held a trust for the support and maintenance of the testator's graveyard, was void.

If the bequest for the keeping of testator's grave, railing and tombstone was a valid one, "the average amount for repair," says Jessell, M. R., *In re Burkett*, his lot and the iron fence "might be ascertained by any competent person." The amount for that purpose being ascertained, the rest must be

devoted to the charitable purposes indicated by the testator. If the bequest was invalid then it falls into the residue.

In *Nourse v. Merriam*, 8 Cush. 11, there was a bequest to the town of Bolton subject to a condition held by the court to be contrary to law and public policy. The question was, whether the void condition could defeat the will otherwise valid or not, and the court held the bequest valid, as if no such illegal condition had been inserted. The same principle is affirmed in *Drury v. Natick*, 10 Allen, 183, where the court say that a condition, so far as it undertakes to impose obligation upon a town for the future, which it could not legally assume, would be repugnant to the grant and void. In *Wilkinson v. Wilkinson*, 12 L. R. Eq. & Bank. Cases, 604, it was held that a condition to do what the law forbids, is invalid, the court holding that a condition which required the omission of a duty, was void. To the same effect is the case of *Attorney General v. Greenhill*, 31 Beavan, 193. When a deed of land is on condition subsequent, the fee is conveyed with all its qualities of transmission. The condition has not the effect to limit the title, until it becomes operative to defeat it. *Shattuck v. Hastings*, 99 Mass. 23. Conditions requiring an illegal act are void. In case of conditions subsequent, when the estate or bequest is made dependent upon their full or continued performance, "if such conditions are illegal or void for any cause, or are or become impossible of performance, the effect is not to defeat the estate dependent upon them, but that continues, having once vested, the same as if no condition had been attached." 2 Redf. on Wills, 2d ed. 285. It must be remarked that here there is no express provision that the estate shall go over on the failure of the condition, in which case regard must be had to the express words of the will.

The condition to take care of the testator's lot in the Piper burying ground is manifestly a condition subsequent. The estate then vests in the town. It must remain there if the condition be one which is against the rules of law.

It is provided in the will, that the school house for the Piper free high school shall be built and maintained by the inhabitants of Parsonsfield. It is objected that they cannot

legally raise money for the purpose of erecting such school house, or to pay the town treasurer and committee for their care of the bequest made to the town.

By R. S. c. 11, § 5, as amended by stat. 1878, c. 20, "every city, town and plantation shall raise and expend annually, for the support of schools therein, a sum of money, exclusive of the income of any corporate school fund, or of any grant, or from the revenue or funds from the State, or of any voluntary donation, *devise* or *bequest*, or of any forfeiture accruing to the use of the schools, not less than eighty cents for each inhabitant, according to the census of the State, by which, representatives to the legislature were last apportioned," &c., under certain penalties in case of neglect.

The minimum tax only is established. It may be increased for educational purposes to any extent that may be deemed advisable. No limitation is placed upon the sum to be raised but the good judgment of the inhabitants raising it.

That a city or town may receive money by devise or bequest, is fully recognized by this section. The gift becomes the property of the town, to be used for the purposes for which it was given.

By § 30, provision is made for a union school for more advanced scholars. By § 31, "two or more school districts may unite for the purpose of establishing and maintaining a system of graded free schools." But graded free schools are high schools.

The design of the testator was to aid the town in establishing a free high school for teaching higher branches of knowledge than are taught in the common grammar schools of the town. It is the giving the supplementary aid recognized by the statute. The fund is under the control of the superintending school committee of the town. The town itself might have raised the money to build the school house needed for a school for more advanced scholars, and provided for an instructor. Much more, then, can the town raise the means for erecting and maintaining the school house in which the munificent bounty of Mr. Piper has furnished the means for provid-

ing for instruction. *Nourse v. Merriam*, 8 Cush. 12; *Cushing v. Newburyport*, 10 Met. 508.

The town have accepted the gift. It is bound to furnish the requisite buildings. It must have a reasonable time for that purpose. When executors or trustees are to pay a legacy to a corporation on conditions precedent, and no time is stated in the will, five years from its probate is allowed for their performance. R. S. c. 74, § 17. If the building of the school house were to be deemed a condition precedent, there is ample time for its erection.

Bill dismissed.

WALTON, BARROWS, VIRGIN, LIBBEY and SYMONDS, JJ., concurred.

Validity of gifts to care for graves or tombstones.—In *Duror v. Motteux*, 1 Vesey, Sen., 820, there was a bequest of money to be laid out in land for an annuity to a minister to preach an annual sermon to testator's memory and to keep his tombstone and the inscription thereon in repair. *Held*, a charitable use.

In *Doe v. Pitcher*, 8 M. & S. 407, the grant was in trust perpetually to repair and, if need be, to rebuild a vault and tomb standing on the land, and to permit the same to be used as a family vault by the donor and his family. Chief Justice Ellenborough said: "It does appear, I think, to be a charitable use in part and in part not. As far as concerns the grantor's own interment it is not, but inasmuch as it is for the family it may be so considered; but then the statute has been complied with."

But see a case between the same parties reported, 6 Taunton, 359, where Gibbs, C. J., holds the gift not a charitable one, and speaks of the Queen's Bench as having so decided.

In *Mellick v. Asylum*, Jacob, 180, the devise was to sell real estate and raise a fund of £2,000 to erect a monument to testator in a certain church. Sir Thomas Plumer, M.R., said: "I think that this is not a charitable use within the meaning of the statute. * * * It stands on the same footing with an expensive funeral and it has never been argued that the expense of a funeral cannot be defrayed out of real estate."

In *Mitford v. Reynolds*, 1 Phillips, 185, testator directed his executors to purchase a lot and prepare it for his remains which were to be placed therein, together with the remains of his parents and sisters then lying elsewhere, and a monument was to be erected. The validity of the devise was not definitely passed upon.

In *Willis v. Brown*, 2 Jurist, 987, there was a direction to trustees to re-

tain out of the estate £10 per annum for the repairs of a monument. *Held*, per Shadwell, V.C., not to be a charitable use.

In *Adnam v. Cole*, 6 Beav. 353, there was a gift to trustees to erect such monument as they thought fit and to build an organ gallery in a church. Lord Langdale, M.R., held the first gift valid and the second invalid as contravening the mortmain acts.

In *Hunter v. Bullock*, L.R., 14 Eq. 45, there was a gift of £1,000 "to pay the required amount for painting and keeping in repair" testator's gravestone and that of his niece, and "the balance that may remain," for the purposes of a charity. It was held by Bacon, V.C., that the trust to repair the tombstone was honorary, and although the sum required was uncertain the gift of the residue was good.

In *Dawson v. Small*, L.R., 18 Eq. 114, the gift was to executors in trust to apply the income of the fund to keeping in good repair all the tombstones of testator and his relatives in G. churchyard, and the surplus to the benefit of poor pious members of the Methodist Society of G. over fifty years of age. Bacon, V.C., held the trust valid as to the poor persons, but void so far as keeping in repair the tombstones was concerned.

In *Re Williams*, L.R., 5 Ch. D. 735, Manlius, V.C., made the same ruling on a devise to apply income to keep certain tombs in repair with a gift over of the accumulated surplus.

In *Re Burkett*, L.R., 9 Ch. D. 576, the bequest was to keep in repair the railing and tombstone of A. with a remainder over. Jessell, M.R., made a similar ruling, but as to the validity of the gift over he questioned the soundness of *Flisk v. Attorney General*, L. R., 4 Eq. 521, on the authority of which *Hunter v. Bullard*, *Dawson v. Small* and *Re Williams*, *supra*, were decided.

In *Swasey v. American Bible Soc.* 57 Me. 523, a devise "to keep in suitable repair the Buck family burying ground so called," was held valid apparently on the authority of *Mellick v. Asylum*, *supra*, and *Lloyd v. Lloyd*, cited in the principal case.

In *Jones v. Habersham*, 3 Woods C. C. 448, a devise to the trustees of a church, upon the condition amongst others that they should keep in good order and have thoroughly cleaned up every spring and autumn testator's lot in a certain cemetery, and that no interments should take place within said lot, was held to be a devise on a condition subsequent of no effect.

In *Dexter v. Gardiner*, 7 Allen, 248, the bequest was to the overseers of the "Friends" preparatory meeting and their successors "to be appropriated for the benefit of the Friends' meetings in said Fairhaven and Rochester." It was sought to invalidate this disposition by proof that one of the objects of the Friends' Society was the purchase and repair of burying grounds. Chapman, J., at page 247, said: "Where a denomination of Christians regard the providing and oversight of burying grounds as a religious duty accompanying burials of the dead with religious services as is usual among most sects of Christians here, it is difficult to see by what principle this religious duty can be distinguished from that of maintaining and repairing meeting houses in respect to the statute." *Doe v. Pitcher*, 6 Taunt. 359, was distinguished on the ground that "the object there was merely secular."

Valid gifts for education of certain classes.—Among the objects enumerated as charitable in the statute of 48 Eliz. c. 4, is the maintenance of "schools of learning, free schools" and "universities."

The following gifts have been held to be charitable as within the language cited, or within the spirit of the same.

Endowment of a professorship in a theological seminary. *Auburn v. Kellogg*, 16 N. Y. 88.

Education of students for the ministry out of a specified congregation. *Welman v. Lex*, 17 S. & R. 88.

Bequest to be "expended in the education of scholars of poor people" in a certain county. *Clement v. Hyde*, 50 Vt. 716.

"For the education of the Freedmen of this nation." *McAllister v. McAllister*, 46 Vt. 272.

Devise and legacy to a bishop and his heirs "in trust for the poor orphans of the State of North Carolina and the said bishop and his successors to have the right to select such orphans" and "to control said trust in the best way for the support of said orphans and the formation of their morals and education." *Meller v. Atkinson*, 68 N. C. 537.

Bequest to trustees "for the promotion of education among the Indian and African children and youth of the United States or elsewhere, as in their judgment they shall deem best." *Treat's Appeal*, 30 Conn. 118.

Bequest of moneys to be used "in the education and tuition of worthy indigent females." *Dodge v. Williams*, 46 Wisc. 70.

Bequest to be applied in part in Pennsylvania and the residue in the United States generally, "for the diffusion of useful knowledge and instruction amongst the institutes, libraries, clubs or meetings of the working classes or manual laborers who earn their bread by the sweat of their brow." *Sweeney v. Sampson*, 5 Ind. 465.

Bequest for the support of indigent pious young men preparing for the ministry in New Haven. *White v. Fisk*, 22 Conn. 81.

"For the benefit, advancement and propagation of education in every part of the world, as far as circumstances will permit." *Whicher v. Hume*, 10 E. L. & E. 218.

Bequest "to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths." *Saltonstall v. Sanders*, 11 Allen, 446.

Valid gifts to maintain schools.—To maintain grammar schools and colleges. *Hadley v. Hopkins Academy*, 14 Pick. 246.

"For the establishment of a free school or schools for the benefit of the poor of a county." *State v. McGovern*, 2 Ired. Eq. 9.

To maintain and support a college although ecclesiastics are forbidden to hold any situation or duty therein or be admitted thereto. *Vidal v. Girard's Exrs.* 2 How. U. S. 127.

For the uses and purposes of the Friends' Boarding School at West Town. *Price v. Maxwell*, 28 Pa. St. 28.

"To build and support a public school for the education of children as the law now directs," to be located as near a certain meeting house as land can be purchased at a reasonable price. *Boxford v. Harriman*, 125 Mass. 321.

Bequest of a residue to executor to invest, "as he may deem best, as a fund, the annual interest of which shall be applied for the benefit of the Sabbath School Library of the First Baptist Church in S., or the Baptist Home Missionary Society; whichever may be deemed most suitable." *Fairbanks v. Lamson*, 99 Mass. 533.

Devise of property to establish a seminary for the education of the children of testator, his brothers and sisters and their descendants, and such poor children of the county as may be selected by trustees. *Franklin v. Armfield*, 2 Sneed. 305.

Devise for the use and support of a "free school" or "institution," for the benefit of poor children, in the town of Zanesville. This language will include children within the limits of the town at the date the charity is distributed, although such limits be larger than when made. *McIntire v. Zanesville*, 17 Ohio St. 352.

"For the sole purpose of supporting a school" in a certain district. *Chapin v. School District*, 35 N. H. 445.

Bequest in trust to maintain a "school house and school to be taught by a female or females, wherein no book of instruction is to be used to teach except spelling books and the Bible." *Tainter v. Clark*, 5 Allen, 66.

Valid gifts for promotion of knowledge generally.—To maintain a free public library and free public reading room. *Drury v. Inhabitants of Natick*, 10 Allen, 169.

To found an institution for the study and cure of diseases of animals useful to man, and to maintain free lectures therein. *London University v. Yarrow*, 23 Beav. 159; a. c. 1 DeG. & J. 72.

In trust to pay income in rewards for discoveries and improvements in light or heat most useful to mankind. *American Academy v. Harvard College*, 12 Gray, 551.

For the delivery of public lectures upon philosophy, natural history, and the arts and sciences. *Lowell*, appellant, 22 Pick. 215.

To establish model and experimental farms to promote the knowledge of the art and science of agriculture. *Northampton v. Smith*, 11 Met. 890.

Legacy to "be applied under the direction of the monthly meeting of Friends of Philadelphia for the northern district, as a fund for the distribution of good books among the poor, or to the support of a free school or institution in or near Philadelphia." *Pickering v. Shotwell*, 10 Pa. St. 23.

Invalid gifts for educational purposes.—The following gifts or devises have been held void:

Bequest to take a house for a school to educate the children and grandchildren of particular persons and other children, is good as to the particular objects, but bad as a general charity. *Blandford v. Fackerell*, 4 Brown's Ch. 297; a. c. 2 Vesey, Jr. 238.

Gift to trustees "that the inhabitants of Chapham may forever have a school." *Attorney General v. Hewes*, 2 *Vernon*, 387.

To maintain a museum for the use of subscribers to a fund. *Thomson v. Shakespear*, 1 *DeG.*, *F. & J.* 399.

To purchase and preserve books for the use of subscribers to a certain library. *Carne v. Long*, 2 *DeG.*, *F. & J.* 75.

Legacy of money to be expended according to the directions of executors "for the establishment of a school at Montrose for the education of children." *Held*, void, because the gift might, consistently with the will, be applied to other than strictly charitable purposes. *Attorney General v. Stone*, 28 *Mich.* 153.

Bequest to certain persons and their successors, "to be expended in the education of colored children, both male and female, in such way and manner as they may deem best," held void for vagueness and uncertainty. *Grimes v. Hammond*, 35 *Ind.* 198.

Subscribing witnesses.—As to who may be subscribing witnesses, see *Troup v. Rice*, 1 *Am. Prob. R.* 18; *Stewart v. Harriman*, *Ib.* 95; *Drake's Appeal*, *Ib.* 227; *Key v. Holloway*, *Ib.* 360; *Smalley v. Smalley*, *Ib.* 566; *Hawkins v. Hawkins*, *ante*, page 401.

OLLIFFE vs. WELLS.

[130 *Massachusetts*, 221.]

INDEFINITE TRUST FOR DISTRIBUTION.—PAROL EVIDENCE TO SHOW CHARITABLE CHARACTER.

A testator devised the residue of his estate to A., "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him;" and appointed A. his executor. *Held*, that the devisee took no beneficial interest in the devise; that the trust on its face was too indefinite to be carried out; that it could not be established against the heirs or next of kin of the testator by evidence of oral communications made to A. by the testator, whether before or after the execution of the will, showing that the trust was for charitable purposes; but that the heirs or next of kin took by way of resulting trust.

BILL in equity, filed December 11, 1877, alleging that the plaintiffs were the heirs at law and next of kin of Ellen Donovan, who died in Boston, on May 23, 1877, and whose will, which was duly admitted to probate, after giving various lega-

cies, contained the following clause : " 13th. To the Rev. Eleazer M. P. Wells, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him : " and nominated said Wells to be the executor.

The bill further alleged that Wells, who had been appointed executor by the Probate Court, claimed the right, after payment of the legacies, to dispose of the residue of the estate according to his own pleasure and discretion, and contended that he had received directions from Ellen Donovan as to the disposition of said residue ; whereas, as the bill charged, the legacy of the residue of the estate had lapsed, and said residue should be distributed among the heirs at law and next of kin of the testatrix.

The bill prayed for a discovery, an account, an order for payment of the residue to the plaintiffs, a temporary injunction against distributing the residue of the estate, and for further relief.

The answer admitted the making of the will and the appointment of the defendant as executor ; left the plaintiffs to prove whether they were the heirs at law and next of kin of the testatrix ; and averred that the testatrix, before and at the time of and after the execution of the will, orally expressed and made known to the defendant, her wish and intention that the rest and residue of her estate should be disposed of and distributed by the defendant, as executor of her will, for charitable purposes and uses, according to his discretion and judgment, and directed the defendant so to dispose of and distribute the said rest and residue ; especially expressing to the defendant her desire that the poor, aged and infirm, and the children and others in need, and worthy of charity and assistance, under the care of or connected with Saint Stephen's Mission, of Boston, and other deserving friends and deserving poor, should be aided and assisted out of said rest and residue, if the defendant in his discretion should see fit so to do ; that the defendant desired and intended, unless otherwise ordered by the court, to dispose of and distribute the said rest and residue for char-

itable purposes and uses, according to his discretion, and especially for the benefit of the deserving poor, aged and infirm, and the children and others in need and worthy of charity and assistance, under the care of or connected with said Saint Stephen's Mission, and other deserving friends and deserving poor, as requested and directed by the testatrix; and that the testatrix, except by her will, gave to the defendant no written direction, wish or order as to the distribution of the residue of her estate remaining after the payment of the legacies.

The case was heard by Colt, J., and reserved for the consideration of the full court, on the bill and answer, and an agreement of the parties that the facts alleged in the answer should be taken as true. If these facts did not show a defense to the bill, the case was to be sent to a master, to determine whether the plaintiffs were the heirs and next of kin of the testatrix, and the amount of the residue of the estate; otherwise, the bill to be dismissed.

L. Mason, for the plaintiffs.

C. Browne & A. P. Browne, for the defendant.

GRAY, C. J. Upon the face of this will the residuary bequest to the defendant gives him no beneficial interest. It expressly requires him to distribute all the property bequeathed to him, giving him no discretion upon the question whether he shall or shall not distribute it, or shall or shall not carry out the intentions of the testatrix, but allowing him a discretionary authority as to the manner only in which the property shall be distributed pursuant to her intentions. The will declares a trust too indefinite to be carried out, and the next of kin of the testatrix must take by way of resulting trust, unless the facts agreed show such a trust for the benefit of others as the court can execute. *Nichols v. Allen*, 130 Mass. 211. No other written instrument was signed by the testatrix, and made part of the will by reference, as in *Newton v. Seaman's Friend Society*, 1d. 91.

The decision of the case, therefore, depends upon the effect

of the fact, stated in the defendant's answer, and admitted by the plaintiffs to be true, that the testatrix, before and at the time of and after the execution of the will, orally made known to the defendant her wish and intention that the residue should be disposed of and distributed by him as executor of her will, for charitable uses and purposes, according to his discretion and judgment, and directed him so to dispose of and distribute it, especially expressing her desire as to the objects to be preferred, all which objects, taking the whole direction together, may be assumed to be charitable in the legal sense.

In any view of the authorities it is quite clear, and is hardly denied by the defendant's counsel, that intentions not formed by the testatrix and communicated to the defendant before the making of the will, could not have any effect against her next of kin. *Thayer v. Wellington*, 9 Allen, 283; *Johnson v. Ball*, 5 De Gex & Sm. 85; *Moss v. Cooper*, 1 Johns. & Hem. 352. But assuming, as the defendant contends, that all the directions of the testatrix set forth in the answer are to be taken as having been orally communicated to the defendant and assented to by him before the execution of the will, we are of opinion that the result must be the same.

It has been held in England and in other States, although the question has never arisen in this commonwealth, that, if a person procures an absolute devise or bequest to himself by orally promising the testator that he will convey the property to or hold it for the benefit of third persons, and afterwards refuses to perform his promise, a trust arises out of the confidence reposed in him by the testator and of his own fraud, which a court of equity, upon clear and satisfactory proof of the facts, will enforce against him at the suit of such third persons. *Chamberlaine v. Chamberlaine*, 2 Freem. 34; *Reech v. Kennegal*, 1 Ves. Sen. 123, 135; s. c. Ambl. 67; 1 Wils. 227; *Stickland v. Aldridge*, 9 Ves. 516, 519; *Jones v. Badley*, L. R. 3 Ch. 362, 364; *McCormick v. Grogan*, L. R. 4 H. L. 82, 88, 97; *Owing's Case*, 1 Bland, 370, 402; *Hoge v. Hoge*, 1 Watts, 163, 214-216; *Church v. Ruland*, 64 Penn. St. 432; *Williams v. Fitch*, 18 N. Y. 546; *McLellen v. McLean*, 2 Head, 684; *Barrell v. Hanrick*, 42 Ala. 60; *Hooker v. A-*

ford, 33 Mich. 453; *Dowd v. Tucker*, 41 Conn. 197; *Williams v. Vreeland*, 5 Stew. (N. J.) 135, 734. See also *Glass v. Hubbert*, 102 Mass. 24, 39, 40; *Campbell v. Brown*, 129 Mass. 23, 26.

Upon like grounds, it has been held in England that, if a testator devises or bequeaths property to his executors upon trusts not defined in the will, but which, as he states in the will, he has communicated to them before its execution, such trusts, if for lawful purposes, may be proved by the admission of the executors, or by oral evidence, and enforced against them. *Crook v. Brooking*, 2 Vern. 50, 106; *Pring v. Pring*, 2 Vern. 99; *Smith v. Attersoll*, 1 Russ. 266. And in two or three comparatively recent cases it has been held that such trusts may be enforced against the heirs or next of kin of the testator, as well as against the devisee. *Shadwell, V. C.*, in *Podmore v. Gunning*, 5 Sim. 485, and 7 Sim. 644; *Chatterton, V. C.*, in *Riordan v. Banon*, Ir. R. 10 Eq. 469; *Hall, V. C.*, in *Fleetwood's Case*, 15 Ch. D. 594. But these cases appear to us to have overlooked or disregarded a fundamental distinction.

Where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased. *Oullen v. Attorney General*, L. R. 1 H. L. 190. Where the bequest is outright upon its face, the setting up of a trust, while it diminishes the right of the devisee, does not impair any right of the heirs or next of kin, in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it enures to the benefit of the *cestuis que trust*; and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust. *Boson v. Statham*, 1 Eden, 508; s. c. 1 Cox's Ch. 16; *Russell v. Jackson*, 10 Hare, 204; *Wallgrave v. Tebbs*, 2 K. & J. 313.

Where the bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, it is equally clear that the devisee takes no beneficial interest; and, as between him and the beneficiaries intended, there is as much

ground for establishing the trust as if the bequest to him were absolute on its face. But as between the devisee and the heirs or next of kin, the case stands differently. They are not excluded by the will itself. The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased not disposed of by his will. *Sears v. Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived of that equitable interest, which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin. See Lewin on Trusts (3d ed.), 75.

By the statutes of the commonwealth, no will (with certain exceptions not material to be here stated) "shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same," unless signed by the testator and attested by three witnesses. Rev. Sts. c. 62, § 6; Gen. Sts. c. 92, § 6.

In *Thayer v. Wellington*, 9 Allen, 283, the testator by his will bequeathed to Hastings and Wellington \$15,000, "in trust, to appropriate the same in such manner as I may by any instrument under my hand direct and appoint," and nominated Hastings executor, and made a residuary bequest to him in trust for the benefit of certain persons named. The testator also signed a paper, dated the same day as the will, referring to it, and addressed to Hastings and Wellington, directing them to pay over the \$15,000 to the city of Cambridge for the support of a public library; and they, after the death of the testator, signified in writing to the city their intention of so paying it when they should receive it from the executor. After the death of Hastings, upon a bill in equity by the administrator *de bonis non* for instructions, to which Wellington, the city, the *cestuis que trust*, and the heirs at law of the testator,

were made parties, the court held that the clause in the will, the paper signed by the testator but not attested as required by the statute of wills, and the assent in writing of the trustees, gave the city no right to the fund ; and that the heirs at law or next of kin would have been entitled to it, but for its being included in the residuary bequest.

It appears in the report on file, upon which that case was reserved for the determination of the full court, that an attorney at law testified that he drew up both the will and the paper at the request of Hastings, and delivered both drafts to him ; and that Wellington testified that the paper was handed to him by Hastings after the testator's death. Those facts would, according to the cases of *Crook v. Brooking* and *Smith v. Attersoll*, above cited, and which were relied on in the argument for the city of Cambridge, have been sufficient evidence of an assent by Hastings before the execution of the will, and, according to the decision of Vice Chancellor Wood, in *Tee v. Ferris*, 2 K. & J. 357, would have entitled the city to enforce the trust against both trustees. Yet, the court did not treat them as of any weight as between the surviving trustee and the city on the one hand, and the next of kin or the residuary legatees on the other, but merely observed that it did not appear at what time the paper was placed by the testator in the hands of Hastings. 9 Allen, 288.

Decree for the plaintiffs.

See *Nichols v. Allen*, *ante*, page 369.

SEWELL vs. SLINGLUFF.

[57 Maryland, 537.]

**ADMISSIBILITY OF PAROL EVIDENCE TO SHOW WILL ONLY TO BE
EFFECTUAL ON TESTATRIX'S DEATH WITHOUT ISSUE.**

Parol evidence is inadmissible to show that an instrument in form a valid will was in fact intended by testatrix to be used and probated only on the happening of a contingency, such as her dying without issue.

APPEAL from the Circuit Court of Baltimore city.
The opinion states the case.

Edward O. Hinkley and *I. Nevett Steele*, for appellant.

John P. Poe and *S. Teackle Wallis*, for appellees.

STONE, J. It appears from the record in this case, that on the 28th of May, 1867, Mrs. Ella Slingleuff, of the city of Baltimore, executed the following paper:

"In the name of God, Amen. I, Ella Slingleuff, of Baltimore county, in the State of Maryland, being of sound and disposing mind, memory and understanding, and knowing the certainty of death, and the uncertainty of the time thereof, do hereby declare and publish this, my last will and testament, in manner following, that is to say: I give and bequeath to my beloved mother, Caroline D. Sewell, all the property that I may die possessed of, of whatever kind, character or description it may be, to have and to hold, to her and her heirs forever.

"Test: ELLA SLINGLUFF. [SEAL.]

"Done this twenty-eighth day of May, in the year eighteen hundred and sixty-seven, and signed in the presence of

"LEWIS E. BAILEY. [Seal.]

"BENA SANDERS. [Seal.]

"JEANNETTE ROPER. [Seal.]"

It is conceded that at the time of the execution of this paper, Mrs. Slingleuff was fully capable of executing a valid

will. That she was at that time married to Fielder C. Slingluff, one of the complainants, and that she was then childless, but expected soon to become a mother, and that in fact her first child was born in the month of July following, and lived until July, 1868, when it died. That Mrs. Slingluff gave birth to another child, Richard S. Slingluff, in the month of October, 1868, and that her child Richard is still living, and is one of the complainants. That Mrs. Slingluff died in January, 1869, and her husband, Fielder C., still survives.

It also appears from the record that the paper above referred to, was delivered soon after its execution to Fielder C. Slingluff, and was by him delivered to Lewis E. Bailey, a connection of the family of Mrs. Slingluff, who kept it in his possession until after the death of Mrs. Slingluff, when he delivered it to Fielder C. Slingluff, who passed it over to the appellant, who now has possession of the same.

That about the month of January, 1875, the appellant declared her intention to present the will for probate, and to assert her rights as legatee under it.

Thereupon the appellees filed their bill in the Circuit Court of Baltimore city, alleging and charging that the said paper was executed by Mrs. Slingluff, and delivered to her husband, with the request and positive understanding and direction that the same was not to be held or taken, or to be used or probated as her last will and testament, in case she should die leaving issue, but in the event of her leaving issue, should be wholly inoperative, so that her estate should pass as if it had never been executed; and also charging that the appellant had full knowledge at the time of the execution of said paper, of the intention and direction so given by the maker, and assented to the same. And the bill prays that the appellant may be enjoined from offering said paper for probate, and that she be ordered to produce the same for cancellation.

The appellant in her answer positively denies that she had any knowledge of, or ever assented to the alleged fact that the paper in question was only to be used or probated in the event of her daughter's death without issue, and she also denies that such was the fact. She also accounts for her delay in asserting

her rights under said paper, by saying, that Fielder C. Slingluff had assured her upon the death of her daughter, that the birth of a child had made the paper inoperative in law, and that she did not know to the contrary until a short time before the complainants instituted this suit. She also claims all her rights as legatee under said paper.

A commission was then duly issued, and a large mass of parol testimony taken by both appellant and appellees, the case set down for final hearing, and the court below passed a decree perpetually enjoining the appellant from offering said will for probate, and directing it to be brought into court to be cancelled; and from this decree she appealed to this court.

The first and most important question that presents itself for our consideration, is whether parol evidence is admissible in this case to prove that the paper referred to, although in form a valid will, was in fact intended by the testatrix to be used and probated as her will only in the event of her dying without issue, and that in the contingency of her dying and leaving issue, it should be wholly inoperative, and her estate should pass as if it had never been executed.

The case is an interesting one and the point so raised a novel one. The case has been very ably argued before us by the eminent counsel engaged in it, and many authorities have been cited, but we have been able to find no case either in England or this country precisely like the present, and the determination of the case must depend more upon the application of well known and well settled general principles than upon the authority of adjudicated cases.

There are three essential requisites for every good and valid will; and these requisites are, perfect testamentary capacity, the intention to dispose of property in the event of death, and the formalities required by the statute. One of these requisites for every perfect will—the intention to dispose of property in event of death—is what the law terms the *animus testandi*, and is thus defined in 2 *Shepherd's Touch.* 204:

“The second thing required to the making of a good testament is that he that doth make it, have at the time of making it *animus testandi*, i. e., a mind to dispose, a firm and advised

determination to make a testament, otherwise the testament will be void," and he then goes on to say, that "if a man jestingly and not seriously writes or says that such a one shall have his goods, this is no will." Now when Mrs. Slingsluff on the 28th of May, 1867, executed this paper, she clearly had this *animus testandi*. The act was not a jest or a sham, but a serious and well considered one. She was perfectly sane, and no fraud or undue influence was practiced on her. She was perfectly competent in every respect to execute a valid will. When, therefore, under these circumstances, she did on that day sign and seal that paper, purporting to be her last will and testament, in the presence of the subscribing witnesses, and declared in writing in the instrument itself, that she did publish and declare it to be her last will and testament, it did then and there become her last will and testament.

The law required her to do nothing more than she did do, to make the will perfect, and she could have done nothing more. No further declaration or act was required of her.

She possessed undoubted testamentary capacity, and the *animus testandi*, and complied literally with the forms required by our statute, by reducing her wishes to writing, signing, sealing and declaring it to be her last will in the presence of three witnesses; and when all this was done, the act was a complete and finished one. If under these circumstances the paper in question was not her last will and testament, it is difficult to describe what it was. It was either her last will and testament, or it was a nullity, and entirely void.

But even the complainants do not claim that the paper was void and worthless at the time of its execution, but only became so by events that happened afterwards.

The whole theory of their case rests upon the assumption that it was a good will on the day of its date, but was avoided afterwards, and that had the testatrix died at any time after its execution and before the birth of her child, that her mother would have taken under the will, without doubt or question. To so much of that theory as recognizes the paper as a valid act, on the day of its execution we assent, and we are of the opinion that at that time it was her last will and testament, and not a nullity and void; and being then her last will

and testament, the question next arises, how it could be made inoperative afterwards.

Wills are more especially guarded and protected by the law, than any other instruments. They are guarded in their inception by the formalities required by our statute, and after they are made, they are equally guarded by our statute, which points out the only mode by which they can be revoked or annulled.

This will may be treated as intending to pass real estate, and the mode of its revocation is pointed out in sec. 302 of Art. 93 of the Code, which provides that no such will shall be revoked, except by some other will, or by burning, cancelling, tearing or obliterating the same by the testator himself, or by some other person in his presence and by his direction and consent. This statute is imperative in its terms, and no mere verbal declarations of a testator, however strongly expressed, and however earnestly he may wish, or intend so to do, can have any effect upon a will after its execution. It can only be revoked in the manner prescribed by the statute. *Wittman and Wife et al. v. Goodhand, Adm'rs*, 26 Md. 95.

To allow the parol declarations of the testatrix, whether made before, after, or at the time of the execution of the will to render that will inoperative at some future time, and in the event of some future contingency, would be nothing more or less than to allow a parol revocation of it. It makes no difference that we can see, whether such revocation is called a revocation or by some other name. To revoke or to render inoperative are synonymous terms, and to allow the evidence for the latter purpose, is to allow it for the former. The practical effect is precisely the same.

But there is another objection to the admissibility of this evidence. We do not understand the complainants to controvert the well settled rule that parol evidence is not admissible to add to, vary or contradict a written instrument, but they seek to exclude the present case from the operation of this rule by insisting that the question before the court is not the construction of the instrument, but whether on the happening of a contingency the instrument should have any effective legal

existence, and they are dealing not with its construction, but with its existence.

Let us see if this position is tenable. Here is a paper presenting upon its face all the *indicia* of a perfect will. In that paper the testatrix asserts in the most unequivocal manner, *and in writing*, that the paper is her will. The paper itself contains no condition whatever, but gives the whole property of the testatrix to her mother unconditionally. Parol testimony is sought to be introduced, to prove that it was given to her mother only conditionally. Would not the effect of this be, if admitted, to add by parol a new clause to the written will?

So that the will would read substantially thus:

I give and bequeath to my beloved mother, Caroline D. Sewell, all the property that I may die possessed of, of whatever kind, character or description it may be, to have and to hold to her and her heirs forever, *provided that I die without leaving issue, but if I die leaving issue, then such issue to have all my property.*

This new and interpolated parol clause makes a different will from that which the testatrix made for herself in writing, and adds to the instrument, and the written will no longer speaks for itself, but its true construction, and the intent of the maker is to be gathered from parol evidence.

The learned judge who decided this case below, says in his opinion:

"Instances are without number of instruments (other than wills) formal in all the requisites of execution, which have been made to be called into effective existence only on the happening of a condition, the condition being made apparent by parol proof; why may not the same be held of wills?"

There are numerous cases where instruments (other than wills), perfect in form have been held as escrows, and only called into effective existence by the happening of a condition, and that condition shown by parol.

There have been many such cases referred to by the appellees, as of deeds, notes, &c. The reason why such instruments are held as escrows is that the consent of some one of the parties to the instrument is withheld until the happening of some

condition. In all such cases, and in all instruments that can be held as escrows, it will be found that the consent of *more than one party is necessary to give validity to the instrument.*

Thus in the case of a deed, the consent of both the grantor and grantee is essential to its validity; and in the case of a note, the maker and payee. These instruments so held as escrows are all in the nature of contracts, by which the parties are to be bound to each other upon the happening of a contingency, but not otherwise. The courts can and do interfere and compel the parties to perform their agreement so made.

But no case has been cited, and we believe none can be found, where a will has ever been held as an escrow, and the reason that applies to other instruments has no applicability to wills.

A will is the act of the testator *alone*, and requires the consent of no other person. It is, when made according to the forms required by law, a completed act, and leaves nothing more to be done; no delivery to any one is necessary. It is in no sense a contract, and no one is bound by it, and the testator can revoke, alter or change it, as often as he pleases, and no one has the right to interfere, and no court can coerce him. It is his privilege and right, which he may exercise or not, at his own pleasure.

Possessing as he does this unrestrained power over his will during his own lifetime, it would be a mere idle and nugatory act to attempt to make an escrow of a will during his life. If the condition is to happen at or after the death of the testator, the evil consequences likely to ensue are more apparent, and an unprincipled custodian, instead of the testator, would have it in his power to make or unmake the will. The three witnesses would be useless. They might indeed depose that the testator was of sound mind, and that he did publish and declare the paper to be his last will, and they would be met with the answer, that all that was true, and that the will was formally executed, but that the testator had given directions, that in a certain contingency it should be inoperative and the property should pass as if it never had been executed. Every condition allowed by law can be *put in a will*, and no good reason can be shown

why every testator who desires a conditional will does not make one. The books are full of such wills. No one is left to the necessity of trusting a part of his testamentary disposition to the uncertain memory of a witness.

In the case of deeds or other instruments that can be held upon condition, the condition must always be a condition precedent and not a condition subsequent, that is to say, the condition must occur *before* the deed is delivered to the grantee, for as soon as the instrument is delivered to the party entitled to it, it at once becomes a completed act.

In *Black v. Shreeve*, 2 Beasley, 458, the court say :

"If the instrument be once delivered to the party, who on its face is entitled to it, it becomes *eo instanti* a deed. No agreement in conflict with the plain tenor of the deed is permitted to be proved—to show that its operation as a deed is to depend upon the performance of some condition subsequent."

As we have said above, the will in this case was a complete and finished act—as much so as a deed delivered to the grantee,—if it were admissible to prove by parol, any condition whatever (which however we do not admit), it must certainly be a condition precedent, and not a condition subsequent.

The case of *Lester v. Smith*, 3 Swabey & Tristram, 282, and the case of *Nichols v. Nichols*, 2 Phillimore, 180, have been much relied on in the argument of this case by appellees. But both these are unlike the case at bar. In them the essential element of a will, the *animus testandi*, was totally wanting, and parol testimony was allowed to show that the paper never was intended at any time and under any circumstances to operate as a will.

In *Lester v. Smith*, Smith had made a will duly executed in which he had left certain property to his daughter, Mrs. Mason. A Mrs. Marshall, the mother-in-law of Mrs. Mason, was the occupant of a house that Smith claimed title to, but Mrs. Marshall refused to recognize his title.

He thereupon fell upon the plan of executing a codicil revoking the devise to his daughter, thinking that Mrs. Mason, when she knew it, would use her influence with Mrs. Marshall

and get her to recognize his title to the house. But he gave explicit directions that this codicil was never to be used or to operate as his will in any event, and had been executed only to effect that collateral object. The case was tried before Sir J. P. Wilde, and although he admitted parol testimony to prove these facts, he said the question gave him some anxiety, and said, speaking of the codicil :

"It was, however, executed in the presence of testator's brother, to whom it was given by the testator, with express directions that he was not to part with it, and that it was in *no event to operate*, or to revoke the bequest made in his will, but to be used only in the manner above described. Similar declarations were made by the testator, at the moment of its execution. A codicil thus duly executed in point of form and attested by two witnesses has been directly impeached by parol testimony. It bears all the appearance on the face of it, of a regular testamentary paper ; but on the evidence, it has been found by the jury, not to have been intended as such by the testator. The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act, are obvious. It has a tendency to place all wills at the mercy of a parol story, that the testator did not mean what he said, on the other hand ; if the fact is plainly and conclusively made out that the paper which appears to be the record of a testamentary act, was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument, and such no doubt is the law. There must be the *animus testandi*."

And further on he says :

"In the present case, however, the court finds the evidence so cogent, that it is prepared to act on the finding of the jury, that the codicil was executed as a sham and a pretence, never seriously intended as a paper of testamentary operation."

We have given a lengthy extract from the opinion in this case, because it was much relied on in the argument. It will be seen, that the testimony was only admitted upon the ground that the codicil was only a sham, never for a moment, or in any

contingency to operate as a testamentary disposition, and that the *animus testandi* was entirely wanting and for no other reason. In the case before us the *animus testandi* did unquestionably exist, and the paper was intended as a testamentary disposition of property at the time of its execution. So in the case of *Nichols v. Nichols*, 2 Phillimore, 180, where parol evidence of a witness to a will was received that the paper was not really the will of the party, but only written by him as a specimen of how short he could write a will. Sir John Nicholl said:

"If this evidence can be received and is to be credited, this is not the will of the deceased, for it wants the great requisite, the *animus testandi*; it was not written with the mind and intention to make a will. A question has been made whether this evidence can be received. I am of opinion that it can and must be received."

These cases go perhaps as far as any cited in allowing parol evidence. But in these and in all the other cases referred to, the courts have restricted the evidence to the ascertainment of the *animus testandi*, and have never gone beyond that. Even if we were to admit that these cases were well decided (which we do not determine), we consider the parol evidence offered in this case inadmissible. If it were in any such case admissible, we would be unwilling to reject it in this, as the straightforward testimony and disinterested conduct of the husband of the testatrix presents a strong case, and one with many equitable features, strongly appealing to our sense of justice. But we must take the law as we find it; and as in all the long period that has elapsed since the passage of the Act of 29th Charles II, no court has permitted such testimony to be received, we cannot do so now.

The only remaining point to be considered is whether Mrs. Sewell is now estopped from asserting her rights, under the will of her daughter. There is nothing in this record that can operate as such an estoppel. There is no Statute of Limitations in this State prescribing a time within which a will must be offered for probate. Mrs. Sewell has satisfactorily accounted for her delay, by her sworn allegation that she was ignorant of

her rights, and there is no evidence before us, that her delay caused any loss or injury to any one, except perhaps herself, and we must, therefore, overrule that exception. No plea to the jurisdiction of the court has been filed in this case, nor any objection to it made at the hearing in the court below, and we have, therefore, decided the questions presented to us in the record. But we must not be understood to decide the question, whether a court of equity has the power to restrain by injunction any one from presenting to the Orphans Court a paper, which he claims to be a last will and testament, or, in any event to order such a paper to be cancelled.

Decree reversed, and bill dismissed.

BRASFIELD vs. FRENCH.

[59 Mississippi, 682.]

**DIRECTION IN WILL TO CONTINUE TESTATOR'S BUSINESS.—LIABILITY
OF ESTATE.**

Where one by will directs the continuance of his trade, only such portion of his estate as is at the time of his death invested in the business, is to be considered as pledged to its subsequent creditors, unless it is unequivocally shown that the general estate or some particular part thereof is to be bound.

APPEAL from the Chancery Court of Monroe county.

Bill to subject the assets of the banking house of Adams, Spratt & Co., and the entire estate of Adams, to the payment of plaintiff's debt, evidenced by a certificate of deposit issued in the name of that firm after Adams' death.

The opinion states the facts.

Murphy, Sykes & Bristow, for appellants.

Houston & Reynolds, for the appellees.

COOPER, J. The testator, by directing the continuance of the business of banking, in which he had been interested during his life, did not render liable to the subsequent creditors of the bank the general assets of his estate. It may be true, as urged by counsel for the appellants, that the principal object which the testator had in view in making his will was to provide for the continued prosecution of the business, and that he looked to the property therein invested, and the profits to be therefrom derived, as the principal source whence the legacies given by him were to be realized; and that the provisions of his will were such that the estate could not be finally administered even as to the property not embarked in the banking house of Adams, Spratt & Co., until the business of that firm should be finally settled: and yet the intention may not have existed to charge his whole estate with the hazard incident to its prosecution. The rule is, that where one, by his will, directs the continuance of his trade, only such portion of his estate as is at the time of his death invested in the business is to be considered as pledged to its subsequent creditors, unless it is unequivocally shown that the general estate, or some part of it, is intended to be bound. One may by will direct his whole estate to be devoted to the purposes of trade, or make it responsible for the debts subsequently to be contracted in a business to be carried on either by his executor alone, or by the surviving members of his firm, or by both such survivors and his executor; but his intention so to do is not sufficiently shown by a simple direction that the trade carried on by him individually, or that of a firm in which he is a member, shall be continued after his death. It is true, that whether the general estate is or is not bound, is to be determined by the intention of the testator as expressed in the will, and that this intention, if disclosed by an examination of the will, as a whole, will be enforced just as it would have been if positively declared, but we do not think the intention of the testator to charge his general estate is shown by the analysis of his will as presented by the counsel for the appellants.

He first directs that the business shall be continued under the supervision of his partner, Spratt, and then unnecessarily

proceeds to give him authority to sign the company's name "to any instrument binding or releasing said company to any and all contracts, within the scope of said banking business, as if I were still living." But who and what is Spratt authorized to bind? It is the company, not the general estate of the testator; the company composed of Spratt and so much of the estate of the testator as by his will he has devoted to the enterprise. What this is is shown by the succeeding paragraph of the will. In the clause just quoted, the testator is intent only on conferring upon his surviving partner the power which he deemed it necessary he should have for carrying on the business, evidently impressed with the idea that a mere direction to carry it on did not confer the power necessary to its prosecution. In the next paragraph, however, he proceeds to indicate the property devoted to the business, the time it shall continue, the division of the profits and losses, the compensation to be allowed to the surviving partner for his services, and the extent to which his interest in the firm shall be bound for the hire of a clerk in excess of the interest of Spratt. This clause is, "that the capital of said company remain and be used as heretofore by said firm until the expiration of two years, or such further time as may be necessary to close up the business of said firm without injury to either party; that the profits and losses shall be shared as heretofore, and that said Henry D. Spratt shall receive from said company \$2,000 annually, and the said executrix shall pay the salary of John C. Wicks, \$2,000 annually, or some other efficient person to be approved of by said H. D. Spratt." It is the interest of the testator in the capital of said firm that is to be continued in it, to "remain and be used as heretofore," and this declaration of what was to "remain" in said business excludes the idea that it was intended by the testator to invest therein any other portion of his estate. *Smith v. Ayer*, 101 U. S. 320; *Ex-parte Garland*, 10 Ves. 110; *McNeillie v. Acton*, 4 De Gex, M. & G. 744; *Burwell v. Mandeville*, 2 How. (U. S.) 560.

The power of the surviving partner to charge the interest of the testator in said firm did not cease at the expiration of two years after the death of the testator. The will directs

that the capital stock of said company shall "remain and be used as heretofore by said firm, until the expiration of two years, *or such further time* as may be necessary to close up the business of said firm without injury to either party." The creditors of the testator might have insisted upon an immediate settlement of the business, and an appropriation of the interest of the testator therein to the payment of their demands against him; and the parties to whom special legacies were given by his will might have proceeded at the expiration of two years to enforce its discontinuance, by showing that further time was not necessary; but, in the absence of any such objections, it was left by the will to the discretion of the executrix and the surviving partner to determine how much longer time than two years was needed to enable them to wind up the business, so as to conserve the interest of both parties in the meantime. It was not required that at the expiration of two years all business should be suspended, except the collection of the debts due the firm, for the will expressly provides that the capital shall remain and be used as heretofore, "until the expiration of two years, *or such further time*," &c. The transactions of ordinary business were to be carried on. If the business was to be conducted as usual for the term of two years, then the giving of further time in which to wind up the unsettled affairs of the company was wholly unnecessary, as without such express delegation of authority it would have existed in the surviving partner *ex necessitate rei*. If any effect is to be given to this clause of the will, it must be construed as conferring permission on the executrix and surviving partner to continue the business of the firm, if, at the expiration of the two years, it should seem to them advisable so to do, to advance the interest of the partners; and, certainly, if this power existed at all, the executrix, who is residuary legatee under the will, cannot now assert that she abused the confidence reposed in her, when called to account by persons who dealt with the firm after the expiration of two years, and who had the right to believe that further time was necessary, because she and the surviving partner, by continuing the business, had in effect declared that it was.

It is charged in the bill that the executrix shared in the profits of the business, and thus became personally liable to the creditors of the firm as a partner. In England, the rule first enunciated in *Grace v. Smith*, 2 Wm. Black. 998, that a person sharing in the profits of a firm became liable as a partner to its creditors, has been to some extent modified by the cases of *Cox v. Hickman*, 8 H. L. Cas. 268; *Kilshaw v. Jukes*, 3 B. & S. 847, and other cases cited and discussed in Lindley on Partnership, 39. A consideration of the question is unnecessary here, because we are of opinion that as to the claim asserted by the complainants, Mrs. French is not liable as a partner, because she was a *feme covert* at the time the money sued for was received by the firm of Adams, Spratt & Co. Code 1871, § 1780, provides that "any married woman may rent her lands, or make any contract for the use thereof, and may loan her money, and take securities therefor, in her own name, and employ it in trade or business. * * * And when a married woman engages in trade or business as a *feme sole*, she shall be bound by her contracts, made in the course of such trade or business, in the same manner as if she was married." Under this statute we have held that a married woman may become a partner in a firm. *Newman v. Morris*, 52 Miss. 402. In *Netterville v. Barber*, 52 Miss. 168, it was said that the effect of the statute is, "that a married woman may engage in trade in the commercial sense, and in other employments which require time, labor and skill, and shall be bound by her contracts made in the course of such business," It may therefore be conceded, that, since the adoption of the Code of 1871, a married woman has been so far emancipated from the disabilities of coverture as to enable her to engage in any enterprise of a commercial or other character, in which she either invests her separate estate, or her time, labor or skill, and that for contracts made in such business, whether prosecuted by herself alone, or by a firm in which she is a member, she would be liable as would be a *feme sole*. There is, however, no allegation in the bill in this cause, that Mrs. French contributed either her time, labor or skill, to the business of the firm of Adams, Spratt & Co., and it is evident that the capital of said

business was exclusively contributed by Spratt and the estate of Adams. The profits arising from the business which were paid over to her did not thereby become a part of her separate estate, for, until the settlement of the estate of Adams, it was in her hands as the executrix of his will, and whether or not any part of it, or if any part how much of it, would become her's as residuary legatee, was dependent both upon the value of the estate and the amount of the debts and legacies with which it was chargeable. Receiving these profits as executrix was not such engaging in trade or business as was contemplated by the statute, and she is protected by her coverture from the demand made against her by the complainants as a partner in the firm.

The complainants are not affected by the decree of the Chancery Court discharging Mrs. French on her petition from her office of executrix. As to them the order is a nullity, and they may proceed against her as if the estate was still open in the court granting the administration of the will. *Pollock v. Buie*, 43 Miss. 140. The Chancery Court has jurisdiction because this is a proceeding against the estate of a deceased person being administered. *Hunt v. Potter*, 58 Miss. 96.

Though, as we have said, Mrs. French is not liable as a creditor to the demand asserted by the complainants, she cannot interpose her coverture as a defense, if it shall appear that trusting to the decree discharging her, she has converted the assets of the estate liable to their claim to her own use. As to these creditors she is still executrix of the estate of Adams, and liable to account to them as such for any *devastavit* she has committed. If the assets received by her from the firm of Adams, Spratt & Co. are still in her hands, they are subject to the complainants' claim, and if she has converted them to her own use she is guilty of a *devastavit*, and is liable notwithstanding her coverture. 3 Williams on Executors, 1840; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Clough v. Dixon*, 8 Sim. 594; *Soady v. Turnbull*, L. R. 1 Ch. 494; *Bellew v. Scott*, 1 Strange, 440.

The fact that the Chancellor, on overruling the demurrer, gave to the complainants leave to amend their bill, did not

preclude them from prosecuting an appeal. They had the right, if they desired so to do, to stand upon the bill as originally drawn, and were not bound to accept the leave to amend. It may be that by prosecuting an appeal they have waived the right to amend; but, as the demurrer was improperly sustained and the leave to amend was unnecessary, we need not determine what result would have followed the affirmance of the decree of the lower court on the demurrer.

Decree reversed.

Power and liability of personal representative carrying on testator's business.—Executors empowered by the will to carry on their testator's business, are personally liable for debts contracted thereby. But they have a right in equity to indemnify themselves for the payment of such debts out of the property lawfully embarked in the trade. *Laible v. Fetry*, 32 N. J. Eq. 791; *Alsop v. Mather*, 8 Conn. 584; *Munty v. Brown*, 11 La. Ann. 472; *Stedman v. Fiedler*, 20 N. Y. 437. *Contra*, *Miller v. Ege*, 8 Penn. St. 352.

Only the property invested in the business at the testator's death is regarded as the trade fund, and apart from a clear declaration in the will of a purpose to subject the remaining property to the risks of the venture, no other of the decedent's property can be so subjected. *Laible v. Fetry*, cited above; *Lucht v. Behrens*, 28 Ohio St. 231; *Callaghan v. Hall*, 1 Serg. & R. 241; *Hardle v. Cheatham*, 52 Miss. 41; *Cain v. Young*, 1 Utah Territory, 361; *Lyon v. Lyon*, 1 Tenn. Ch. 225; *Austin v. Monroe*, 47 N. Y. 360.

In *Laible v. Fetry*,—a very leading case,—Dixon, J., after reviewing the English and American authorities, says: "The principle deducible from all of these cases then are, that where a testator orders his business to be carried on after his death *prima facie*, only the fund employed in the business before his decease is answerable to the subsequent creditor; but that, if by clear and unambiguous language he designates, or authorizes to be set apart any other portion of his estate to be embarked in the trade, such creditors may also resort to the fund thus appropriated."

A direction by a testator to his executor to raise crops on his estate until his debts were paid, is, to some extent, in the discretion of the executor, and an administrator, with the will annexed, is not bound, regardless of trial and circumstance to continue cultivating indefinitely. *Johnson v. Henagan*, 11 S. C. 189.

Where an executor is clothed with discretionary power to improve unproductive property, the power conferred being without limit, and the

testator's wish appearing to be to keep the estate intact, the executor may raise money on mortgage for this purpose. *Starr v. Moulton*, 97 Ill. 525.

Under the Georgia Code of 1868, §§ 1821-23, it is the rule in that State, since the abolition of slavery, that property of intestates shall not be kept together from year to year, and worked for the benefit of the estate. The ordinary has no authority so to order except for the current year. *Johnson v. Parnell*, 60 Ga. 661.

An executor cannot, at the risk of the succession, carry on planting operations and contract, in so doing, debts so as to bind the estate. *Florsheim v. Holt*, 32 La. Ann. 138.

An executor in working a plantation, must bring himself under the statute, or within the provisions of the will, or show the consent of the parties interested. *Billingslea v. Young*, 88 Miss. 95.

An administrator who finds a raw commodity on hand (tobacco for instance), may lawfully, without a fraudulent intent, put it in a condition in which it is usual to sell it, or in which, under the circumstances, it can be best sold. *Whitley v. Alexander*, 73 N. C. 444.

Where the will of the testator, under which a trust arose, gives no power to the trustee to use the trust funds in a partnership, retaining all profits over interest, the trustee cannot claim the profits, or justify such use of the trust funds, by oral proof that the funds were thus used in pursuance of verbal instructions of the testator before his death. *Malone v. Kelley*, 54 Ala. 533.

An executor of the estate of a merchant cannot properly invest the proceeds of an estate in the purchase of other goods to continue the business, without the consent of the *cestuis que trust*, nor can the County Court confer upon him such authority. *Field v. Cotton*, 7 Ill. App. 379.

In New York, a request by the executor that goods be delivered for use in the business of the partnership, with a promise to pay therefor, as soon as the estate is settled, does not change the general rule or make him a joint debtor with the surviving partner. *Richter v. Poppenhouser*, 42 N. Y. 373.

The rule at common law, that an administrator may complete and enforce a contract of the decedent—not personal, or requiring peculiar skill or taste—is declared to be unchanged by statute in Illinois, except that the administrator, who so acts without order of court, assumes the risk of losses incurred therein. *Smith v. Wilmington Coal, &c., Co.* 83 Ill. 498. See also *Oram's Estate*, 9 Phila. 358; *Newton v. Poole*, 12 Leigh, 112.

In *McKee v. Mobley* (3 S. C. 242), the common law doctrine of confusion as applied to purchases made by an administrator and added to the retail stock of the decedent, for the benefit of the estate, is discussed.

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ACCOUNTING.

1. Testatrix died in this State owning property here and in Michigan. She gave legacies to individuals in each State and appointed two persons from each State executors as to the property within the State of their residence. Each set of executors qualified and took possession of the assets within their respective jurisdictions. *Held*, that the executors in this State took no title to the property in Michigan and should not include the same in their inventory, nor were they accountable therefor. *Sherman v. Page*, 105
2. Where certain tribunals have acquired jurisdiction over an estate and its representative within their territory, the representative is bound to account to them only for all assets, and the courts of other States cannot interfere. *Woodruff v. Young*, 407

See JURISDICTION.

ACTION TO CONSTRUE WILL.

1. An executor cannot maintain an action for the construction of a clause of a will disposing of real estate, unless he is invested with a trust under the will in reference to the subject-matter of the devise. *Dill v. Wisner*, 509

ADMINISTRATOR. *See* EXECUTOR; MORTGAGE; PLEDGE OF ESTATE SECURITIES.

ADMINISTRATION. *See* JURISDICTION; REVOCATION OF ADMINISTRATION.

ADVANCEMENT. *See* CONSTRUCTION, 8.

AFTER-ACQUIRED REAL ESTATE.

1. Under a statute declaring that every will which in express terms devises or in other terms denotes an intent to devise all the testator's real estate, "shall be construed to pass all the real estate which he was entitled to devise at the time of his death," such a will operates upon lands acquired after the making of the will. *Byrnes v. Baer*, 388
2. In the absence of express words to bring a devise within the statute, the intention must be found in the words of the will; it cannot be inferred from extrinsic facts; the words, however, as in case of other instruments, may be interpreted in the light of the surrounding circumstances. *Id.*
3. Where a testator gives in general terms the residue of his estate or

AFTER-ACQUIRED REAL ESTATE—continued.

property, and there is both real and personal property upon which the will may operate, the testator does thereby manifest an intention to devise all of his residuary real estate, unless a more limited purpose is to be gathered from other clauses of the will. *Id.*

4. A devise of the proceeds of the lands directed to be sold by the executors is a devise of the land within the statute, although the naked title remains in heirs until a sale. *Id.*
5. Testator wrote, "I have some real and personal property, and I do hereby make the following disposition of it," proceeding to specifically describe and devise such property. *Held*, that after-acquired property did not pass by such will. *Sharpe v. Allen*, 455

ANNUITY.

1. Testator gave one-half of his residuary estate to E., the other half "to be put at interest," and \$100 a year paid to A. in person annually, the first payment to be made one year after testator's death. E. was then made general residuary legatee. *Held*, that the annuity was not limited to the interest merely, but A. was entitled to the full amount specified, to be made up out of principal, if the interest was insufficient. *Bliven v. Seymour*, 447

See INTEREST.

ATTESTATION. *See EXECUTION OF WILL.*

ATTESTATION CLAUSE. *See EVIDENCE*, 17.

BEQUESTS.*(A) Conditional.*

1. Testator bequeathed a sum of money to his brother H. "for that he the said H. shall look after and take care of our beloved brother R. while he shall live, and bury him at his death." R. died before the testator. *Held*,
2. That the bequest to H. was upon condition subsequent and its performance becoming impossible by the act of God he took unconditionally. *Hammond v. Hammond*, 119
3. Testator gave a sum of money to his executors in trust, to pay the income to the New York Home for the Blind, so long as it cared for one William Gordon, and the principal to such institution if it cared for him during his entire life. If such institution was not maintained suitably for the care of the blind then the income should be paid to any other society selected by Gordon which might maintain him, and the principal should go to such society as was maintaining him at the time of his death. *Held*, that the bequest was valid; that the maintenance of Gordon was a condition subsequent and an offer by the home to care for him, made at the testator's death, entitled it to the legacy irrespective of the fact that previously Gordon had been expelled from the home for breach of its rules. *Livingston v. Gordon*, 356

BEQUESTS—*continued.*

4. Testator bequeathed to his wife A. "the sum of \$400 annually" "out of the income of my estate during her natural life," to be in lieu and in full discharge of all right of dower; and "if she shall refuse to accept the same in lieu of dower then she shall be entitled to have only her right of dower in my estate." Thereafter he obtained a divorce from his wife for her misconduct, and four years later died, leaving a large estate. The wife, by statute, lost her dower after divorce. *Held*,
5. That the bequest was absolute and not conditional on A.'s remaining testator's wife. *Cord v. Alexander*, 897
6. That the divorce did not of itself revoke or annul the bequest. *Ib.*

(B) *For Life.*

7. The gift of the perpetual income of real estate is a gift of the fee; a gift of the income for life is a gift of a life estate. *Sampson v. Randall*, 1
8. The same rule applies to personal estate, and the donee for life has the actual possession of the property, unless the will otherwise provides. *Ib.*
9. The court may require security from the donee for life that the property shall be forthcoming, intact, at the expiration of the life estate, in a case of real danger. *Ib.*
10. A testator appointed his wife executrix, willed that his just debts be paid, and that his wife raise his children as she thinks proper, and bequeathed to her all his estate, "both real and personal, during her natural life or widowhood, and what then remains to be equally divided between my (his) children." *Held*, that the wife took a life estate in the realty, and that the words "what then remains" did not raise any implied power of disposition thereof. *Foot v. Saunders*, 73
11. The rule, that where personal property is given by will to one for life with remainder over, the executor shall sell so much of it as is of a perishable nature, applies only to the case of a residuary bequest given *eo nomine* as such; and this rule, being one of construction, must be relaxed when necessary to give effect to the testator. *Britt v. Smith*, 87
12. A testator devised and bequeathed to his wife during her life all his land and all his personal property, and in a subsequent clause of the will (after certain specific legacies) he gave his sister at the death of his wife, all the balance of his personal property of every description, not heretofore disposed of; at his death, the personal property consisted of farming implements, crop, stock, notes, &c. *Held*, that the widow is entitled to have the specific articles of personalty delivered to her as tenant for life. *Ib.*
13. A testator bequeathed to his father and mother, and the survivor of them, a sum of money for their use and support, during the term of

BEQUESTS—*continued.*

their lives; any part thereof remaining unexpended after their death, besides paying their funeral expenses and purchasing grave stones for them, to go to the testator's son. *Held*, that the legatees took a life estate, and not an absolute property in the money; that they are entitled to the custody and control of the money during their lifetime, or until used and expended for their support; and that the court could not interfere with their possession of it, unless in an extreme case of unfitness of the legatees to exercise the discretion committed to them, or in the case of a threatened wanton ill-use of the fund intrusted to their care *Copeland v. Barron*, 190

14. A will contained the following clause: "To my beloved wife P. (so long as she remains my widow) I give all the income of the home farm, on which I now live, containing two hundred acres, more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom; also, the mansion house in which I live, together with all belonging to it, and all that is in it, or about it, I give to my beloved wife P., the same to be hers and to belong to her forever." *Held*, that the widow had a life estate in the realty, limited further by the duration of her widowhood, and that she took the personalty absolutely. *Cooper v. Pogue*, 196
15. Where there is a general residuary bequest of real and personal property for life with remainder over, the legatee is not entitled to the possession of the personal assets, but the same should be invested by the executor and the interest or income paid to such legatee. *Brannock v. Stocker*, 333

(C) *Payable out of Rents and Profits.*

16. The chancery rule construing gifts of fixed sums payable out of rents and profits as authorizing the taking of a part of the body of the estate to make up a deficiency, is so far modified in New York as to make the question depend on the intention of the testator. *Delaney v. Van Aulen*, 337
17. Testatrix made a residuary devise of real and personal estate to her executors in trust, to receive the rents of the real estate and to invest the personal estate, and to apply such rents and the income of the personal estate to the use of her husband for life, except that they should apply to one D., who had been brought up by her, certain fixed sums per annum during his life, but no disposition was made of the fund after D.'s death. *Held*, that the legacy to D. was payable out of the annual profits of the estate, and the corpus of the estate could not be resorted to in the event of a deficiency of profits.

BEQUESTS—*continued.*(D) *Repugnant Gifts.*

18. Testator gave to his two daughters the use of \$1,000 each, directed "the principal to go to their children respectively," expressing the wish that the \$1,000 "devised" to his daughter A., in case of her death, leaving no child living, should go to E.'s children, but if A. died leaving children, the latter were to have the use of the same, and when the youngest attained majority the same to be paid to said children. *Held*, that the language defined the previous gift of \$1,000, though the word "devise" was inaccurately used; that the bequest to E.'s children was not repugnant to the previous gift to A.; that there was no trust nor illegal suspension of the power of ownership. *Biven v. Seymour*, 447

(E) *To Subscribing Witness.*

19. Where there are only two subscribing witnesses, a bequest to one is made void by the statute requiring such a ruling "if the will cannot otherwise be proved." *Fowler v. Stagner*, 484

(F) *During Widowhood.*

20. Testator bequeathed real and personal estate to his widow, "to have and to hold the same during her widowhood," and should she marry after his decease, then she was to have only a child's part of the property. *Held*, that the widow's estate was terminable by her marriage only, and was not affected by her death unmarried. *Frey v. Thompson's Adm'r*, 238

BILL OF INTERPLEADER.

If a legatee is not described in a will with exact accuracy, and the description may in some respects be applicable to different persons, each of whom claims the legacy, the executor may maintain a bill of interpleader for the determination of the person to whom the legacy is payable. *Morse v. Stearns*, 51

BURDEN OF PROOF. *See* EVIDENCE.

CAPACITY.

1. The fact that at the execution of his will testator was under guardianship, and had previously been declared to be of unsound mind, are only *prima facie* evidence of lack of testamentary capacity. *Estate of Johnson*, 524
2. Where, after the will had been signed by the testator and the witness at his request and in his presence, the scrivener asked deceased if the paper was his will, and he replied affirmatively. *Held*, there was a sufficient declaration that the instrument was his will. *Id.*
3. No legal presumption of unsoundness of mind arises from proof of inebriety—it is a fact to be considered by the jury. *Id.*

CHARITABLE USES.

1. A testator, by a will executed within one month of his death, left a bequest to a church, to be expended in masses for the repose of his soul. The statute prohibits devises or legacies for charitable or religious uses unless by will executed at least one month before death. *Held*, that the bequest was within the statute and void. *Rhymer's Appeal*, 171
2. A bequest in a will, devising to the trustees of a certain organized church, having trustees, and to their successors, \$1,000, to be put at interest, and the interest to be appropriated annually to the suppression of the manufacture, sale and use of intoxicating liquors, and providing that if said trustees failed for two successive years to use the interest as directed, then the whole bequest should go to the heirs of the testator, is valid. *Haines v. Allen*, 242
3. A bequest of "all that may remain" of testator's real and personal estate, in trust to persons named, "to expend" the same "in the purchase and distribution of such religious books or reading as they shall deem best and as fast as the funds shall come into their hands," is sufficiently definite and certain to create a valid charitable use. *Simpson v. Welcome*, 248
4. The word "religious," applied to books and reading, means tending to promote the religion taught by the Christian dispensation. *Ib.*
5. A direction that the trustees of a public library shall not exclude any book because of its differing from the conventional notions on the subjects of theology, morals, medicine, etc., does not avoid the trust; it is a negative recommendation only. *Manners v. Philadelphia Library Co.*, 287
6. A direction to publish certain works which are averred to be atheistic, coupled with a gift to found and endow a library, does not avoid the gift; it is not a condition precedent, and if illegal, it will be disregarded. *Ib.*
7. Where a charity is a residuary devisee of land, a purchase by the testator, within thirty days of the testator's decease, though expressly in trust for that charity, passes to the charity as residuary devisee. *Ib.*
8. A will, after several bequests to individuals and to charitable corporations, contained the following clause: "After the payment of the foregoing legacies, and all expenses and charges in the settlement of my estate, should there be any surplus, I give and bequeath the same to my executors and the survivor of them, or their successors, if any such should be appointed to administer on my estate, to be by them distributed to such persons, societies or institutions as they may consider most deserving." By a separate clause two persons were appointed executors. *Held*, that the executors

CHARITABLE USES—*continued.*

- took the bequest in trust; that the trust was not a charitable one, and was too indefinite to be carried into effect; and that the next of kin took by way of resulting trust. *Nichols v. Allen*, 369
9. Towns or cities may hold in trust funds given for the purposes of education. *Piper v. Moulton*, 574
10. A testator made a bequest of one hundred dollars to a town, in trust, on condition that the town should expend the income thereof, forever, to keep his lot in a certain burying ground in good order and condition, and an iron fence around the same; and made another bequest to the town of the rest and remainder of his estate to establish a school fund, on condition that said town should accept and perform the conditions as to his lot in the burying ground. *Held*,
 (1.) That the bequest of the hundred dollars was not for a charitable use, and was void as creating a perpetuity.
 (2.) That the bequest to establish a school fund was valid. The condition to keep the testator's lot in repair was a condition subsequent. The estate passes to the town subject to the condition subsequent if valid; if void or against law, discharged of the condition.
 (3.) The bequest being on condition that the town erect a building for the Piper High School, that the town is authorized to raise the amount of money necessary for that purpose. *Id.*

CLAIMS AGAINST ESTATE.

1. A claim against decedent's estate arising on his assuming a mortgage, is not provable until after foreclosure. *Terhune v. White*, 6
2. An indorsement may, under the statute, be allowed as a contingent claim against the estate of a deceased person. *Curley v. Hand's Estate*, 178
3. When a note is allowed by the commissioners against the insolvent estate of a deceased surety, and afterwards a dividend is paid on the note by the trustees of the insolvent principals, who have assigned, in the final distribution of such surety's estate by the Probate Court, the owner of the note is entitled to a dividend only on the balance, and not on the amount so allowed. *Lowell v. Estate of French*, 507

See COMPROMISE OF CLAIMS; FUNERAL EXPENSES.

CODICIL.

- Where a codicil distinctly refers to and re-affirms a will, the provisions of the former may be treated as embodied in the latter, and both may be viewed as if executed and published at the same time. *Caulfield v. Sullivan*, 48

COMMISSIONS.

An agreement made by a trustee with his *cestui que trust*, in regard to the amount of compensation he shall receive for his care of the trust property, is not invalid if the *cestui que trust* is *sui juris*, and competent to act, and no fraud is practiced or undue advantage taken; and such agreement should be taken into consideration by the Probate Court in determining the amount the trustee is entitled to charge. *Bowker v. Pierce*, 109

See GUARDIAN AND WARD, 8.

COMPROMISE OF CLAIMS.

1. Executors and administrators have the legal right to compromise debts due the estate. *Moulton v. Holmes*, 546
2. A statutory provision that, under certain circumstances, an executor or administrator, "with the approbation of the Probate Court," may compound or compromise claims, is not restrictive of common law powers, it enables the representative to act with perfect safety and without being subjected to expense in sustaining his acts. *Id.*

CONDITIONS. See CONSTRUCTION, 6; DEVISE, 8, 9, 10.

CONSTRUCTION.

1. Testatrix, after stating "I hold a number of notes against my brother," directed that in a certain contingency a specified note should be cancelled and on other events happening, a like disposition should be made of all other notes, *Held*, that this language only applied to notes held at the time of making the will, and not to those subsequently acquired. *Updike v. Tompkins*, 81
2. As a general rule a will speaks from the death of the testator, but this is otherwise when language is used which repels the presumption. *Martin v. Martin*, 220
3. A will which provides that "after the death of testator's daughter, he gives her children and grandchildren," etc., contemplates descendants then unborn who shall be in being at the time of the daughter's death. *Cheever v. Circuit Judge*, 60
4. A testator directed his executors to divide the sum of \$20,000 into as many shares as there should be lawful issue of my deceased nephew, Matthew Horn, living at his death, and to invest the same and apply the income of each of said shares "to the use of each of said children respectively." At the time of the execution of the will and of testator's death, Horn had living three children and seven grandchildren, two of them children of a deceased daughter. *Held*, that the provision did not include any of the grandchildren. *Palmer v. Horn*, 92
5. A. devised his lands to B. for life, in the following words: "All the . . . real estate I may die seized of." He owned 160 acres of land, and no more, one-half of which was in section 27 and the other moiety was the east half of the north-east quarter of section

CONSTRUCTION—*continued.*

28. He devised the portion in section 28, by a correct description, to C., at the death of B., charged with certain legacies, and devised the portion in section 28, to D., at the death of B., charged with certain legacies, but by mistake in the particular description of the land devised to D., the word *south* was inserted instead of *north*. *Held*, that so much of the description as is erroneous should be rejected, and that the land will pass to D., on the death of B., by the other provisions of the will. *Merrick v. Merrick*, 161
6. A testator directed the proceeds of certain real estate to be "equally divided as follows:" one share to one daughter absolutely; one share to three other daughters, minors; and one share each to two other daughters during their natural life. *Held*, that the infant legatees are each entitled to an equal share with the others. *Holman v. Price*, 216
7. A devise of all "properties, real and personal, of every description, in the city of Chicago, county of Cook, and in Ogle county, State of Illinois; also all money and properties which may hereafter come to me," will pass real estate outside the city of Chicago, and in Cook county. *Higgins v. Dwen*, 259
8. Where a will is artistically drawn and evinces an accurate use of technical terms the presumption is that the testator used them in their legal sense. *Porter's Appeal*, 234
9. Testator after identifying notes of his son and daughter added, they "are deemed by me as advancements to the respective drawers thereof; and I order and direct that they be valued and appraised at their full amounts as assets of my estate in the hands of my executors, and to be respectively paid and accounted for by the respective drawers thereof at the first distribution of the residue of my estate, out of their respective shares therein." *Held*, the will being artistically drawn, the word advancement was used in a technical sense, and it was error to charge interest on the notes in distributing the estate. *Ib.*
10. The word heirs in a devise to the heirs of a living person to take effect immediately, is to be interpreted as a *designatio personum*, and referring to the heirs apparent. *Stuart v. Stuart*, 527
11. This rule is inapplicable to a devise of a future estate and there the word heirs has its strict legal meaning. *Ib.*
12. The word family as a designation of beneficiaries in a will, excludes parents, and is generally confined to children. *Ib.*
13. A devise of real estate to trustees for the use of testatrix son's wife and his family, and when he ceases to have a family, to his heirs forever, requires the application of the income to the support of the wife and children as a family, excluding children not residing

CONSTRUCTION—*continued.*

at the father's home, and ceasing when the wife dies, when all the daughters have married or attained twenty-one, and when all the sons have attained that age; as the family then ceases to exist. *Ib.*

CONTINGENT REMAINDERS.

Land was conveyed in trust to permit A. and others to use it during their respective lives, and, on the purposes of the trust being accomplished, to convey it to certain children of A. by name, "and such other children of A. as shall then be living." *Held*, that the children named took contingent remainders only. *Smith v. Rice*, 381

CONTINUING TESTATOR'S BUSINESS.

Where one by will directs the continuance of his trade, only such portion of his estate as is at the time of his death invested in the business, is to be considered as pledged to its subsequent creditors, unless it is unequivocally shown that the general estate or some particular part thereof is to be bound. *Drayfield v. French*, 607

DEVISE.

(A) *Fee or Life Estate.*

1. Where a testator devises an estate in general terms, without specifying the nature of the estate, and gives the devisee a power of disposition of the property, providing a limitation over; if the power of disposal is unconditional, the devisee takes a fee; if conditioned upon some certain event or purpose, he takes a life estate only. *Stuart v. Walker*, 79
2. Where an estate is devised to a person expressly for life, with a power of disposal qualified or unqualified, the devisee takes an estate for life only, with a power to dispose of the reversion. *Ib.*
3. The testator made a devise and bequest (discarding redundant words), running thus: "I devise and bequeath to my wife the rest of my estate, real and personal, with the right to use, sell or otherwise dispose of the same, and the income and increase thereof, according to her own will and pleasure, during her lifetime. And so much of said estate, with the increase, income and proceeds thereof as may remain unexpended and undisposed of by her at her decease, I give," &c.

Held, this devise gives, in express terms, an estate to the wife, limited to her lifetime, not to be extended by any implication arising from the power of disposal annexed; the words, "during her lifetime," qualifying all the previous clauses of the devise.

Held, also, that the estate devised, with its income, increase and proceeds, real and personal, into whatever form converted or appropriated, so far as the same can be traced and identified, which re-

DEVISE—*continued.*

- mained unexpended by the wife at her death, should be surrendered, conveyed and paid over to those persons who were secondarily entitled to the estate under the will. *Id.*
4. A will contained the following clause: "To my wife M. I bequeath, demise and assign, and, in case of her death, then to her heirs and assigns forever, all the residue of my property, this not to conflict with her rights of dower, should there be children born to us, then the child or children to share alike with my wife as residuary legatee." The testator died without children. *Held*, that his wife took an estate in fee. *Brown v. Merrill*, 148
 5. A testator gave to his grandson James, a certain plantation "to hold during his lifetime, and if it shall so happen that he has any lawful heirs, I give it to them or any of them that he may think proper; and should it so happen that he dies without any lawful issue for the land to be equally divided among all my grandchildren." At the time of executing the will testator had a son and daughter who had children living. *Held*, that James was then single, but subsequently married and had children. James took a life estate only, and the remainder in fee vested in his children as purchasers. *Patrick v. Morehead*, 261
 6. Real estate was devised to testatrix's daughters, "to be divided equally," coupled with the statement that in case of the death of a daughter without issue her share should go to her sisters, and if there were issue it should be divided equally between her offspring. In consideration of which the daughters were to provide for their father if he became destitute. *Held*, that the daughters did not take a fee but only a life estate. *Johnson v. Johnson*, 281
 7. The imposition of a charge upon a devisee operates to enlarge the estate granted him only where the terms of the devise are indefinite. *Id.*

(B) *Conditions.*

8. Testator devised his farm to his two sons upon condition that they should not sell the same until ten years after one became of age, except to one another; neither should they mortgage it. *Held*,
9. That the devisees took a fee. That the condition was void and repugnant to the devise and contrary to public policy. *Anderson v. Cary*, 187
10. A will provided as follows: "I give, devise and bequeath my whole estate both real and personal, all that I now possess or may hereafter become possessed of, to my beloved son Matthew. Learning that the law takes cognizance of the intention, even when illegally expressed, I desire to express my wish as strongly and emphatically as I can do so by will, that my beloved son Matthew shall inherit,

DEVISE—*continued.*

possess and own, in fee simple, all my worldly goods—to dispose of as he may think fit. But should he die without leaving a will, then the whole to go” over. *Held*, that the limitation over depended upon a condition subsequent, which was void because repugnant to the estate devised, and that Matthew held, in fee simple absolute, a tract of land derived under this will. *Moore v. Sanders*, 245

11. A devise “in consideration” of the testator being taken good care of and well treated by the devisee and her husband for the remainder of the testator’s life, is not a devise on condition; and failure of the consideration will not defeat or avoid the will. *Martin v. Martin*, 220
12. A direction that the remainder of testator’s estate, both real and personal, be divided “among my (his) heirs according to the laws of the State of Tennessee now in force, none preferred, none discriminated against,” vests the realty in the heirs, as prescribed in the statute of descent, and the personalty in the next of kin, as specified in the statute of distribution. *Alexander v. Wallace*, 291

(C) *Generally.*

13. Under a will reading “and it is my desire that if O. G. shall pay the interest annually, or what is due from him, to wit, on \$541, that he be not disturbed in his possession of the place where he now resides,” *held*, that O. G. took a life estate in the premises on condition that he paid the interest required, and further, he should pay all taxes assessed during his life tenancy. *Garland v. Garland*, 348
14. A devisee by a testator of *all* of his property, of every description, whether real, personal or mixed, after paying all his just debts, is a devise of the fee, without the aid of a statute declaring such to be the effect of the devise. *Piatt v. Sinton*, 380
15. Where there is a devise in fee, with a provision in the will that in case the devisee should die without leaving any legitimate heirs of her body, then the estate should go over to persons named, the fee taken by the first devisee is determinable only on the contingency of her dying without leaving such heirs living at the time of her death. *Id.*
16. Testator devised the sole use of certain real estate to his wife so long as she remained his widow, and at the time she ceased to be his widow the “profits and benefits” of such real estate to be equally divided between his children and grandchildren, adding a direction that when his son Samuel attained majority, said real estate

DEVISE—*continued.*

should be sold—provided his wife's widowhood was ended—and the proceeds divided amongst the same beneficiaries. He named executors, directing them to "act and see the accomplishment of" his will. *Held* :

17. That by the words "profits and benefits" the testator did not intend to devise a fee. *Collier v. Grimesey*, 437
18. That the direction to sell was imperative; and the time of sale after Samuel became of age and the widow's estate ceased. *Id.*
19. That the duty of making the sale devolved on the executors, and as one declined to qualify the other should execute the same. *Id.*
20. Testator, after payment of debts, devised the residue of his estate, real and personal, as follows, to wit: to his wife and five youngest children, whom he named, a specified farm; the rest of his personal estate also to his wife "and the five above named heirs—that is to say," to his wife for life and to the minor heirs until they became of lawful age; to his "other heirs and oldest children, heirs at law," naming them, five dollars each; "and at the time of the youngest heir becoming of lawful age, the property, both real and personal to be divided amongst my children, share and share alike." *Held*, that it was the intention of the testator that the farm devised should be divided amongst his children when the youngest child became of age; that the devise of such farm to the widow and five youngest children was a qualified devise to them until the youngest child attained majority; the word "heir" means child. *Bland v. Bland*, 475
21. A general residuary devise carries every real interest of the testator whether known or unknown, immediate or remote, unless clearly excluded. *Floyd v. Carow*, 499
22. Testator, after certain specific legacies, gave the residue of his real and personal estate to his executors, in trust, to pay the income to his wife for life, and at her death to "assign, transfer and set over" all his "real estate" not therein disposed of, to her appointees, and failing appointment to her heirs at law. At his wife's death he devised certain premises to two legatees for life, and the fee on their death to their issue then surviving. Such devisees were unmarried at testator's death, and thereafter died without issue. *Held*, that the two devisees left in testator a contingent reversion in fee expectant, on the determination of the life estates and failure of issue, which went to the appointees of testator's widow. *Id.*
23. A devise by testatrix of all her real estate charging the same with the payment of "just debts, funeral and testamentary expenses and all the pecuniary legacies," creates no trust, but only a lien for the payment of debts. *Dill v. Wisner*, 509

DOWER. *See* ELECTION.

ELECTION.

1. An election by a widow to bar her of dower must be made in person—it does not pass to her legal representatives on her decease. It must be matter of record in court as required by the statute, or under such circumstances as create an estoppel against her legal right. *Milliken v. Welliver.* 417
2. Where it does not appear that the widow acted with a full knowledge of the condition of her husband's estate and of her rights under his will, the payment of his debts out of his money, receiving and holding the balance, and possessing and controlling the real and personal estate for five months, do not create such an estoppel. *Id.*

EQUITABLE CONVERSION.

1. A positive testamentary direction to an executor to sell the testator's real estate, after the death of his widow, effects an equitable conversion thereof. And a daughter to whom the testator, by a subsequent clause in his will, gave and bequeathed a share of his estate, takes no interest in the real estate which can be bound by a judgment obtained against her in the lifetime of the testator's widow. *Jones v. Caldwell,* 154
2. A subsequent provision in the will, that if the heirs shall agree to a division of the estate among themselves, the executor shall not be bound to sell, does not prevent a conversion. *Id.*

ESTOPPEL.

1. One who accepts of a devise or bequest does so on condition of conforming to the will, and he is bound to give full effect, as far as he can, to its legal dispositions. *Caulfield v. Sullivan,* 43
2. Testator owning property in France and America made plaintiff, to whom he was indebted, his universal legatee on condition that "she executes the disposition" thereafter contained in his will, which subsequently bequeathed to his brothers all his property "in America, * * * without exception." *Held,* that plaintiff was bound to elect between her claim of indebtedness and the provisions of the will, and that the acceptance of the property in France barred such claim against the estate. *Id.*

EVIDENCE.

(A) *Burden of Proof.*

1. Where the testator is shown to be weak in mind, though not sufficiently so to create testamentary incapacity, and a person whose advice had been sought and taken, receives a large benefit under the alleged will, such person must show affirmatively all the circumstances connected with the drawing of such will, and that the tes-

EVIDENCE—continued.

tator had a full understanding of the nature of the disposition contained in it. *Cuthbertson's Appeal*, 54

(B) Declarations of Testator, Devisee or Legatee.

2. Declarations by the testator that he executed the will in the presence of the attesting witnesses, are admissible to rebut the evidence of such witnesses to the contrary. *Beadles v. Alexander*, 173
3. Proof of the genuineness of the signatures of the subscribing witnesses raises a presumption of attestation in testator's presence. Positive testimony to the contrary makes the question one for the jury to decide. *Ib.*
4. On an issue of undue influence, sustained in part by proof of inequality of bequests, statements of testator, made long before the execution of his will, that he intended to discriminate in the manner he has done, are admissible. *Dye v. Young*, 815
5. Declarations of a legatee are not admissible to impeach a will where all the legatees are not joined. *Ib.*
6. Prior statements of a testator as to how he intended to dispose of his property, disconnected from the act of making his will, are not evidence of the fact of undue influence. *Will of Storer*, 827

(C) Generally.

7. Mistakes apparent upon the face of a will may be corrected, but not mistakes claimed to arise solely on extrinsic evidence. *Judy v. Gilbert*, 89
8. Testator owned only "the northeast quarter of the southeast quarter" of a certain section of land. In his will he devised the "northeast quarter of the southwest quarter" of the same section to his wife for life, remainder to her children. *Held*, that parol evidence was inadmissible to show that the land actually owned was purchased by testator with money borrowed from his wife under a promise to devise the same to her and her children, and that he intended so to do in his will. *Ib.*
9. Extrinsic evidence of the conduct and the declarations of a testator is admissible to show his relation to, and state of feeling towards, any of the respective claimants of a legacy, where the legatee is not described with entire accuracy, and the description is in some respects applicable to each of the claimants. *Morse v. Stearns*, 51
10. A woman who had two nephews, one named Joseph White Sprague, and the other Joseph Sprague Stearns, by her will bequeathed a legacy "to my nephew J. S. Sprague." *Held*, that the inference was that she intended Joseph White Sprague; and that, in the absence of extrinsic evidence sufficient to control this inference, he was entitled to the legacy. *Ib.*

EVIDENCE—*continued*.

11. Alterations in testator's handwriting in a will are presumed to have been made before execution, or if made afterwards and there be codicils, then before the execution of the last codicil. *Linnard's Appeal*, 96
12. Where a will is destroyed with the connivance of some of the heirs, an innocent party in establishing the same is not required to prove the exact language in which it was written, but may show in general terms the disposition made by the testator of his property—that it purported to be his will and was duly attested. *Anderson v. Irwin*, 116
13. Extrinsic evidence of the facts and circumstances respecting persons or property to which the will relates are admissible to explain the meaning and application of testator's words. *Hammond v. Hammond*, 119
14. A will speaks from the death of the testator and not from its date unless by a fair construction its language indicates the contrary intention. 126
15. Upon an issue as to undue influence in procuring the execution of a will on the part of those who appear to be preferred in it, proof that the will is unequal in its distribution of the property, even though the testator was of impaired mind and memory, is inadmissible if there be no actual evidence of undue influence. *Will of Storer*, 327
16. On such an issue, evidence that the wife of testator, who is one of those preferred by the will, had great control over him in the ordinary affairs of life, is inadmissible without evidence that her influence was exerted to procure the execution of such will. 126
17. The contents of the will may be proved by the copy after it is shown to be accurate; and the testator's attempted execution and his preservation of the copy is such evidence that the original, which was complete and not provisional, was his will, that, with his declaration to that effect, the testimony of the copyist, who is disinterested and credible, and corroborating circumstances, it will justify the probate. *Wilbourn v. Shell*, 520
18. The question of the due execution of a will is to be determined like any other, in view of all the legitimate evidence in the case; and no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must of course, under ordinary circumstances, give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial. *Webb v. Dye*, 558
19. Upon an issue *devisavit vel non* a certificate of attestation signed by the subscribing witnesses, showing that all the requirements of the

EVIDENCE—continued.

statute for the valid execution of the will have been complied with, is proper to go to the jury with the other evidence on the question of the due execution of the will. *Ib.*

20. Parol evidence is inadmissible to show that an instrument in form a valid will was in fact intended by testatrix to be used and probated only on the happening of a contingency, such as her dying without issue. *Sewell v. Slingluff*, 597

See EXECUTOR, 10; TRUST, 20.

EXECUTION OF WILL.

A will must be subscribed but need not be proven by two attesting witnesses. *Webb v. Dye*, 558

It is not material in what part of the will the attesting witnesses sign their names, if it were done after the subscription and acknowledgment of it by the testator and with the purpose of attesting it. *Fowler v. Stagner*, 484

See CODICIL.

EXECUTOR.

1. An executor or administrator is bound to bring to the management and closing of an estate the same care and diligence which a prudent man would exercise under like circumstances. The liability of the executor for the loss of the estate is not wholly dependent on the question of whether he has acted in good faith. *Spaulding v. Wakefield's Estate*, 14
2. It is negligence on the part of an executor to deliver a \$1,000 U. S. 5-20 bond, worth at the time in all the markets of the country \$1,200, to each of three legatees in payment of a \$1,000 legacy to each; and he is liable for the loss. *Ib.*
3. The executor is also liable for the premium and interest on an \$800 bond deposited in the bank to create a fund upon which to draw to pay the expenses of settling the estate; as it was not found by the commissioner that the creation of such a fund was necessary. *Ib.*
4. The executor was entitled to no leniency at the hands of the court, by virtually remaining silent as to how much the bond brought, how much interest he received on it, whether he mingled the avails with his own funds, etc., and should, therefore, be charged with the highest market value of the fund, and the highest rate of interest. *Ib.*
5. Executors under a will which gives them exclusive powers and trusts, and provides for unborn heirs, may appeal from its disallowance though all the beneficiaries named in it, and all who would have been interested if the decedent had died intestate, should settle the estate among themselves and oppose the appeal. *Chesver v. Circuit Judge*, 60

EXECUTOR—*continued*.

6. A testator directed his executor to sell all his property and to pay the interest thereof to his mother during her life; after her death he bequeathed certain legacies, and all the residue of his property he directed his executor "to appropriate and use for and in the erection and construction of a suitable monument at my grave, such as the amount of funds in his hand will warrant." *Held*, that testator's mother having died and his legacies being paid, his executor had a right to apply all or any part of the testator's estate remaining in his hands, which he saw proper, to the erection of a monument at the grave. *Bainbridge's Appeal*, 112
7. An executor is not a guarantor of the safety of securities in his charge belonging to the estate; he is bound simply to exercise such prudence and diligence in the care and management of the estate as men of discretion and intelligence in general employ in their own like affairs. *McCabe v. Fowler*, 126
8. An executor left government bonds in the custody of testator's nephew, who had been intrusted with them for safe keeping by deceased in his lifetime. No reason for any suspicion of the nephew's integrity or financial ability was shown until it was discovered that he had converted them to his own use. The executor died prior to the time of the conversion. *Held*, that the latter's estate was not chargeable with the loss. *Id.*
9. An executor who gives a separate bond is not liable for a loss caused, without negligence on his part, by the default of his co-executor. *McKim v. Aulbach*, 252
10. A joint receipt, or a joint release of a mortgage, signed by two executors, is only *prima facie* evidence that the money derived therefrom came into the possession or under the control of both, and this presumption may be rebutted by proof that the money was in fact received by one, and that the other joined only as matter of form. *Id.*
11. A loan of money by one executor to a co-executor upon the latter's individual note and representations that the money was to be used to pay debts of the estate, but it was not in fact so used, is not a proper charge against the estate. *Croft v. Williams*, 479
12. An executor who receives and pays over estate funds to a co-executor, is liable for the latter's misappropriation of the same. *Id.*
13. Where, however, two executors under a power of sale in the will entered into a joint contract for a sale of real estate, and the purchaser made a payment in the presence of both, which one of them took without objection from the other, and subsequently misappropriated. *Held*, that, in the absence of evidence charging him with negligence, the latter was not liable; that the fact that the co-executor was insolvent was not alone sufficient to so charge him; and that the fact that he joined in the sale did not make him liable. *Id.*

EXECUTOR—continued.

14. Also *held*, that he was not made liable by acts of negligence on his part, which in no way were connected with or contributed to the loss. *Ib.*

See ACCOUNTING; ACTION TO CONSTRUCT WILL; PLEDGE OF ESTATE SECURITIES.

FUNERAL EXPENSES.

1. Only such necessary expenses for the funeral of a deceased person, and the care of his estate, as cannot properly be postponed until an administrator shall be appointed, are chargeable against the estate. *Samuel v. Estate of Thomas*, 100
2. In this case, no administrator having been appointed until five or six months after the death of T., the plaintiff, his sister, expended over \$500 for a tombstone and curbing for his grave, and for memorial cards. The administrator having declined to repay these sums without an order of the court: *Held*, that such order was properly refused. *Ib.*
3. The fact that the deceased was under legal guardianship as an insane person, and that after his death the guardian approved the expenditures, does not affect the rule. *Ib.*
4. Disbursements for dinner and horse feed furnished to persons who attended deceased's funeral, are not proper charges as part of the funeral expenses. *Shaeffer v. Shaeffer*, 278
5. Such a claim cannot be controlled or aided by a custom of the neighborhood. *Ib.*

GUARDIAN AND WARD.

1. A guardian's discretion in respect to the boarding and schooling of a ward stands on a similar footing with a parent's. *Gott v. Culp*, 64
2. His discretion in expenditures for the clothing of a female ward cannot usually be reviewed if they are not out of proportion to her social position and are made in good faith and are not in excess of her means. *Ib.*
3. A guardian should not exceed his ward's income without adequate reason. While it is prudent to obtain leave in advance to use the principal, it is not necessary; if circumstances justify it the use ought to be made. *Ib.*
4. A guardian should not be held for interest upon his ward's moneys not actually received, unless his delay to invest has been unreasonable. *Ib.*
5. A ward was the niece of the wife of her guardian, and lived with him as one of his family, worked therein, and was boarded, clothed

GUARDIAN AND WARD—*continued.*

- and schooled as one of his own children. The guardian frequently declared to the ward and others that he regarded her as one of his children, and would do by her as his own. He never applied to the court for an allowance for her support, nor did it appear that he made any charge in his books for her maintenance. *Held*, that the guardian had placed himself *in loco parentis* to his ward, and was not entitled to a credit in his final account for her maintenance *Horton's Appeal*, 151
6. Where a guardian in good faith accepts as cash from his predecessor in office, loans on judgment bonds subject to prior like liens which, at the time of acceptance, were such security as careful men would regard as good, and subsequently one becomes worthless through an extraordinary depression in real estate, he is not guilty of negligence making him chargeable with the loss. *Jack's Appeal*, 185
 7. A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must, before applying any of his ward's income to that end, procure the sanction of the proper court. *Burke v. Turner*, 489
 8. A guardian is not entitled to commissions on money collected and used by him in his own business, nor on debts of his ward paid to a firm of which the guardian is a member. *Id.*
 9. He should be allowed reasonable attorney's fees, paid in good faith. *Id.*
 10. Where one who is aware of the misapplication of trust funds by a guardian, afterwards succeeds to that office, he is guilty of *laches* if he fails to charge the first guardian in his settlement with him with the sum so misappropriated. *Id.*

INTEREST.

1. Interest on general legacies runs from the expiration of a year after the testator's death, unless the will clearly expresses an intention that it shall be computed from an early date or event. *Walsh v. Brown*, 221
2. A legacy to a minor child; or in satisfaction of a debt; or a bequest of an annuity, or of a residue in trust to pay the income to a legatee for life, with a gift of the principal over, are exceptions to the rule and bear interest from the testator's death. *Id.*
3. A legacy of a specific sum of money—the interest whereof is payable annually to one for life—the principal being payable after his death to another person, is not an exception to the general rule. *Id.*
4. Distinction stated between an annuity and legacy of a specific sum, the income of which is payable to a life tenant with a gift over of the principal. *Id.*

See EXECUTOR, 3: GUARDIAN AND WARD, 4.

INTOXICATION. *See* CAPACITY.

INVESTMENTS.

1. A trustee under a will, who, in good faith and in the exercise of a sound discretion, decides to retain an investment made by the testator in stock of a railroad corporation, when it is gradually falling in value in the market, is not responsible for the depreciation, although the stock becomes worthless. *Bowker v. Pierce*, 109
2. *It seems*, that investments by executors or testamentary trustees which take the funds out of the jurisdiction of the court, will not be sustained and are made at the peril of the investor. The case must be rare and the circumstances unusual and peculiar to make an exception to this rule. *Ormiston v. Olcott*, 209
3. The rule relates only to voluntary investments by the trustee, and does not govern a case where, by act of the testator, a foreign investment has been made, or where, without the fault of the trustee, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. *Id.*
4. The rule that each of several co-executors is only liable for his own acts, and cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein, applies as well where the executors are also trustees. *Id.*
5. A direction in a will that a legacy be put at interest must be strictly followed. In such a case bank stock is not a proper investment. *Gilbert v. Welch*, 302
6. An investment of estate funds in securities in the name of the executor is improper. *Id.*
7. The creator of a trust requiring the investment of money may designate how the investment may be made and what security may be taken, and he may dispense with all security. *Denike v. Harris*, 364
8. Testator directed his executors to allow his copartner to retain his contribution to the firm capital to be employed in conducting the business for not longer than three years, with annual payments of interest. *Held*, that such copartner was not compellable to give any security for the loan. *Id.*

See GUARDIAN AND WARD, 6.

JOINT WILL.

There can be no such thing as a joint will to take effect upon the death of the survivor. A will must take effect at the death of the testator, and not at a time still in the future. *Hershy v. Clark*, 464

JUDGMENT.

1. If a judgment against an administrator is not evidence of assets in his hands in the State where it was recovered, it cannot have such force in another jurisdiction. *Coates v. Mackey*, 181

JUDGMENT—*continued*.

2. No recovery can be had in this State against an administrator personally on a judgment recovered against him in his representative capacity in another State. *Id.*

JURISDICTION.

1. An agent of a legatee appointed by power of attorney to ask for and receive letters of administration, is "a person interested in the estate" within the statute, and the surrogate has jurisdiction to award the letters asked for on such agent's petition. *Russell v. Hartt*, 297
2. Where a testator, not an inhabitant of this State, dies out of it, leaving assets, the surrogate of the county where the assets are has jurisdiction to take proof of the will, and may act, though the original will is in the possession of a court of another country, and cannot be produced before him. *Id.*
3. Letters of administration granted on the estate of a living person are void. *D'Arment v. Jones*, 424
4. The words "all personal property situated in this State" in a statute regulating administrative distribution, do not include money deposited in bank within the State, or a note secured by mortgage on land therein, when the bank-book and note are found at the intestate's foreign domicile, and administration is there granted. *Speed v. Kelly*, 553

See ACCOUNTING.

LEGACY.

1. Testator devised "five thousand dollars of the W., C. and A. Railroad bonds, also 287 shares" of another company's stock, with other similar gifts. He died thirteen days after executing his will, owning five of such bonds of the face value of \$1,000 each, but selling in the market at thirty cents on the dollar. *Held*, that the legacy was specific of the five bonds testator owned. *Kunkel v. Macgill*, 132
2. Legacies may be charged upon real estate without express direction, if the intention of the testator so to do can be fairly gathered from all the provisions of the will; and extraneous circumstances may be considered in aid of the terms of the will. *Hoyt v. Hoyt*, 318
3. Testator, after directing payment of his debts, and making specific legacies to grandchildren, payable at their majority, gave the "rest, residue and remainder" of his real and personal estate to his wife for life, and after her death part of the real estate to a daughter for life, and part of the personalty absolutely, and the "rest, residue and remainder" of his estate to four of his children. Six years later he made a codicil giving his widow power to sell the real estate subject to the approval of his heirs. At the time of making

LEGACY—*continued*.

- the will his personalty was sufficient to pay debts and specific legacies, but it was insufficient when the codicil was made. *Held*, that it was the intention of the testator that the legacies should be paid at all events, and the real estate was liable for such payment. *Ib.*
4. Testator, after directing the payment of his debts and funeral expenses, and after giving a series of legacies, gave the residue of his estate, real and personal, to his wife. Then followed this clause: "and I authorize my executors, after paying my just debts and funeral expenses, to pay over to my wife \$5,000 in cash out of the bequeath to her and before any of the other bequeaths are paid off." The executors were authorized and directed to sell and dispose of all of the real and personal estate, with power to reserve certain parcels of real estate until prices specified could be obtained therefor. In an action to obtain a construction of the will, *held*, that the intent of the testator was to charge the payment of the legacies upon the real estate; also, that the gift to the wife was in lieu of dower. *Le Fevre v. Toole.* 408
 5. The fact that a specific legacy of a gold watch to one of testator's daughters immediately precedes a gift of thirty-five dollars in money to another daughter, both children receiving equal provision in other clauses of the will, does not raise a presumption of an intent to make the money legacy specific also. *Biven v. Seymour,* 447
 6. Whether legacies are a charge upon a real estate devised is a question of intention upon the part of the testator. *Read v. Cathers,* 515
 7. Where the testator gives legacies without directing who shall pay the same, or out of what fund they shall be paid, the personal estate being the primary fund for the payment of legacies, the legal presumption is, that he intended they should be paid out of his personal estate only, and if that is not sufficient the legacies fail. *Ib.*
 8. Even where the testator uses introductory words, which would raise by implication a charge upon the real estate, that implication is rebutted where he disposes of his personal estate in the form of a residue after the gift of legacies. *Ib.*

See INTEREST.

MORTGAGE.

An administrator's mortgage given upon the estate to raise money to pay its debts is invalid if the order allowing it does not follow the statute and specify the time for which it may run and the rate per cent. at which it shall be given. The good faith of the parties will not make it valid. *Detroit F. & M. Ins. Co. v. Aspinall,* 166

NEGLIGENCE. *See* EXECUTOR, 1, 2, 3, 7, 8, 9, 10, 14.

PLEADING.

A bill is multifarious that seeks to compel accounting as to the management of an estate, and to enforce complainant's right as devisee, and which charges the executrix with fraud in obtaining from complainant a deed of property, and a co-defendant with individual frauds. *Woodruff v. Young*, 407

PLEDGE OF ESTATE SECURITIES.

1. An administrator has no legal power, or right, to borrow money, and pledge the property of the estate in payment. *Merchants' Nat. Bank v. Weeks*, 145
2. If an administrator borrows money, he is personally liable; but whether it is to be repaid from the estate, is a question for the Probate Court, on the settlement of his account. *Ib.*
3. One of several executors placed certificates of stock belonging to his testator with a broker as collateral security for his personal indebtedness, delivering also a blank bill of sale and power of attorney executed by himself as executor. The broker pledged the stock to one, who advanced money thereon, believing the broker to be the real owner of the stock. *Held*, that there could be no recovery of the stock by the remaining executors until the advances made thereon were paid. *Wood's Appeal*, 285

POWERS.

1. A power of sale to several executors may be executed by the sole qualified executor. *Jennings v. Teague*, 8
2. A direction to executors to sell all testator's estate "so soon as the value of property shall recover from the depression caused by the existing war," makes them the sole judges of the time for action, and a sale made in the exercise of their honest judgment is valid even if shown to be an error of discretion. *Ib.*
3. Testatrix empowered her husband "to sell and dispose of" her property, which she devised to her children—"when it shall appear to him to be advisable so to do, having an eye to the support and education of the children." *Held*, that no authority to mortgage the property was conferred—a conversion only was permitted. *Stokes v. Payne*, 28
4. An authority to an executor to take entire charge of the estate "without any bond or any liability," "relying on his integrity and judgment entirely," confers no power of sale or authority not ordinarily possessed by an executor as such. *Alexander v. Wallace*, 291
See DEVISE, 2, 18, 19.

PROBATE PROCEDURE.

1. Where a will is in a foreign language it is proper that the probate

PROBATE PROCEDURE—*continued.*

should contain a translation of the same in English. *Caulfield v. Sullivan*, 48

2. Probate of a will, where the surrogate had jurisdiction, cannot be attacked collaterally. *Piper v. Moulton*, 574

3. In proceedings for the probate of such a will, the exhibition of the original document before commissioners appointed by the surrogate to take testimony in the foreign country is substantially a production of the same before such surrogate. *Russell v. Hartt*, 297

See WILL, 1, 2.

PUBLICATION. *See* CODICIL.

RENTS.

1. Rents which accrue from the real estate of an intestate, after his death, go to his heirs, and not to his administrator. *Evans v. Hardy*, 391

2. The receipt by an administrator, except when otherwise specially provided, of the rents, issues and profits of the real estate of an intestate, accruing after his death, makes the administrator the trustee of the heirs and not of the creditors of the estate, but the application of such rents, etc., to the payment of his decedent's debts does not create any claim against the estate in favor of the heirs, but is a conversion of the money in his hands, belonging to the heirs, for which he is personally liable. *Ib.*

RESIDUARY DEVISE. *See* AFTER-ACQUIRED REAL ESTATE, 8; BEQUESTS, 17; CHARITABLE USES, 7; DEVISE, 21, 22.

REVIVAL OF FORMER WILL.

A will is not revived by the destruction of a subsequent will when the latter or any intermediate will had contained a clause revoking all former wills. *Scott v. Fink*, 410

REVOCATION OF ADMINISTRATION.

1. A county court, in the absence of statutory authority, has no power to revoke letters of administration after the administrator has accepted and qualified. *Munroe v. People*, 470

2. A failure to pay a creditor his claim allowed, against the estate, although the estate was solvent and all other claims had been paid with the fact that the administratrix had, by deed from the heirs, become the owner of the only piece of land on which the creditor's judgment was supposed to be a lien, does not make a case for removal for waste or mismanagement, or other cause. *Ib.*

REVOCATION OF WILL.

1. Where the testator undertakes to dispose of both real and personal estate and he subsequently conveys the real estate, it will not, in general, work a revocation of the will as to the personal property owned by him at his death. *Warren v. Taylor*, 36

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REVOCATION OF WILL—*continued*.

2. Testatrix in her will gave a legacy of five hundred dollars. Subsequently she drew her pen across the word five and wrote the word and figure three. *Held*, that the intention was not to revoke the gift, but to reduce its amount. *Linnard's Appeal*, 96
3. Under a statute that no will shall be revoked unless the testator, or some one in his presence directed by him "with intent to revoke, shall destroy or mutilate the same," the marking out, by testator, of his signature by pencil lines, coupled with the required intent, constitutes a revocation. *Woodfill v. Patton*, 200
4. Under a statute that no will or any part thereof shall be revoked or altered except by a new will or instrument executed with similar formalities, or unless such will be burnt, torn, canceled, obliterated or destroyed, with intent to revoke, an obliteration to be effectual must destroy the whole will, an obliteration of a single clause is of no effect. *Dovell v. Quitman*, 351
5. If, in order to correct the spelling in his holographic will and make it more legible, the testator has it copied, and attempts to execute the copy, which proves defective from want of sufficient attestation, the original, although destroyed by him, should be admitted to probate. *Wilbourn v. Shell*, 520

TRUST.

A testator devised the residue of his estate to A., "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him;" and appointed A. his executor. *Held*, that the devisee took no beneficial interest in the devise; that the trust on its face was too indefinite to be carried out; that it could not be established against the heirs or next of kin of the testator by evidence of oral communications made to A. by the testator, whether before or after the execution of the will, showing that the trust was for charitable purposes; but that the heirs or next of kin took by way of resulting trust. *Olliffe v. Wells*, 590

See CHARITABLE USES; DEVISE, 24.

UNDUE INFLUENCE. *See* EVIDENCE.

WILL.

1. If a will, duly executed and witnessed, incorporates in itself by reference a paper not so executed and witnessed, containing directions as to the disposition of the testator's estate, such paper, if in existence at the date of the will and clearly identified as the paper referred to, is a part of the will, and should be admitted to probate as such. *Newton v. Seaman's Friend Society*, 18

WILL—continued.

2. The Probate Court, after admitting a will to probate, and after the time for appealing from the decree has passed, may admit to probate a paper referred to in the will, and which in law forms part of it, and which by mistake was not presented to the court when the will was admitted to probate. *Id.*
3. Testatrix made a bequest to one Isabella Fosselman, and left an envelope addressed "Dear Bella, this is for you to open," containing a note for \$2,000 and a letter over her signature reading "My wish is for you to draw this \$2,000 for your own use should I be called off sudden." *Held*, that the letter and inscription on the envelope constituted a valid testamentary disposition of the note operating as a codicil to testatrix will. *Fosselman v. Elder*, 541

WITNESS.

1. An executor or administrator cannot testify in his own behalf in support of his private claim against the estate, which he nominally represents, but which in that instance is the real defendant against which he is proceeding as plaintiff. *Preble v. Preble*, 168
 2. The wife of a legatee is a competent subscribing witness. *Hawkins v. Hawkins*, 401
 3. The wife of an executor not beneficially interested under the will is a credible attesting witness thereto. *Piper v. Moulton*, 574
 4. An inhabitant of a town to which a bequest is made for the support of schools therein is a competent attesting witness. *Id.*
- See BEQUESTS, 19.*

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